

**LAW 20**

Student Module Booklet

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## MODULE 3: FAMILY LAW

**Alberta**  
EDUCATION





## **Law 20**

### **Module 3**

# **FAMILY LAW**



Law 20  
Student Module  
Module 3  
Family Law  
Alberta Distance Learning Centre  
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Welcome to Module 3.

We hope you'll enjoy your study of Family Law.


To make your learning a bit easier, we've made an audiocassette to help you work through the material.

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turn on your tape and listen.





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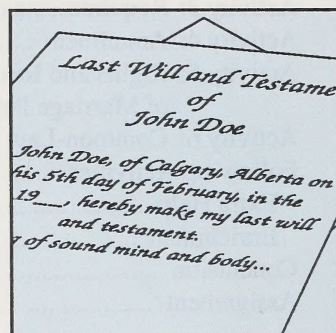
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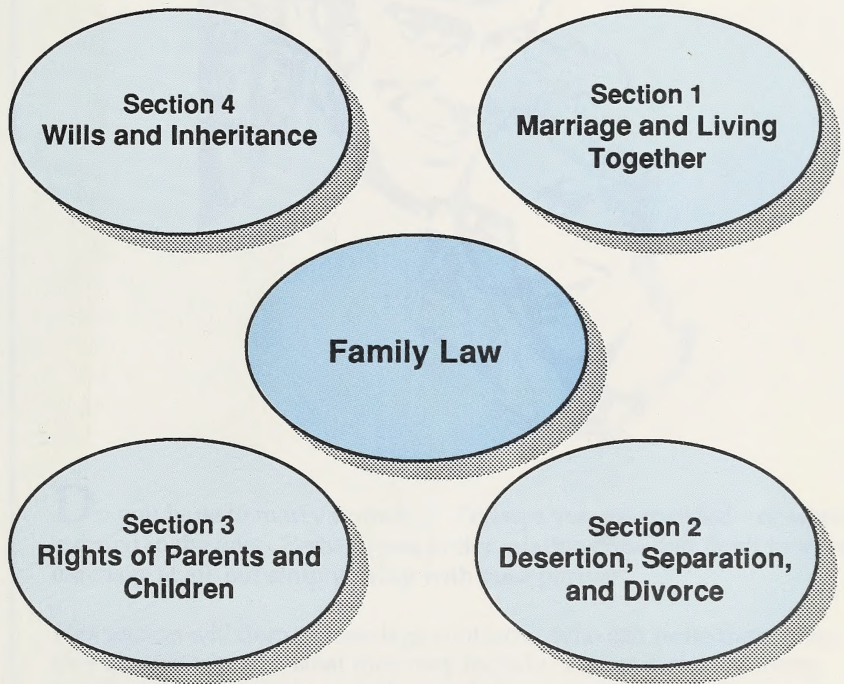
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## OVERVIEW

One area of law that has a direct impact on every one of us is family law. Rules governing such things as marriage and divorce, the rights of parents and children, and the inheritance of property through wills have profound effects on how we live our lives. In Module 3 it will be matters such as these that will provide the focus of your studies.



## Evaluation

Your mark in this module will be determined by your work in the Assignment Booklet. You must complete all assignments. In this module you are expected to complete four section assignments. The mark breakdown is as follows:

<b>Section 1 Assignment</b>	<b>20%</b>
<b>Section 2 Assignment</b>	<b>28%</b>
<b>Section 3 Assignment</b>	<b>28%</b>
<b>Section 4 Assignment</b>	<b><u>24%</u></b>
<b>TOTAL</b>	<b>100%</b>



## Marriage and Living Together

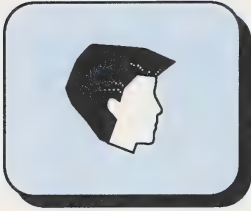


**D**o you hope to marry someday? Perhaps you are married – or were married in the past. Perhaps you prefer relationships that don't involve marriage at all, but simply living with your partner.

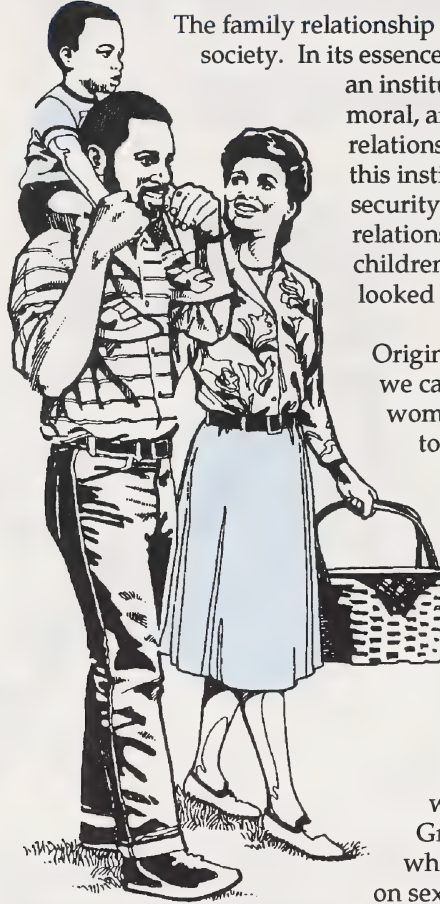
This section will discuss marriage contracts: who can write them, why they are written, and what they may include. Persons who are living together but who are not legally married may also draw up a written contract which will define each party's responsibilities. Such contracts will also be discussed in Section 1.

After completing this section you should be able to

- discuss the legal aspects of engagement and of breach of promise
- discuss the legal requirements of a marriage
- state the grounds of annulment
- describe the rights and responsibilities of spouses
- describe the rights and responsibilities of common-law partners



## Activity 1: Marriage and the Powers of Government



The family relationship is one of the oldest institutions in our society. In its essence it isn't a legal entity at all, but rather an institution that developed to give social, moral, and religious backing to a long-term relationship between a man and a woman. It is this institution that brings responsibility and security to what is essentially a sexual relationship. More, it helps ensure that children resulting from the relationship will be looked after and provided for.

Originally marriages were much like what we call *common-law* unions today. Men and women who wished to, simply lived together and raised a family. However, as society became more complex, it became necessary to assign legal rights and duties to the parties in a marriage; and gradually marriage became a legal institution. It became necessary to ascertain property rights for example, and for purposes of inheritance the matter of legitimacy of children had to be settled. If marriages broke up, there had to be ways of determining what belonged to each partner. Gradually, then, the law came to control what had begun as an institution based on sexual relations, love, and trust.

Today in Canada the federal government has the power to enact laws concerning marriage and divorce. This means it has the power to establish the essential requirements of a valid marriage. This includes

- rules regarding persons consenting to a marriage
- the physical and mental states of persons wishing to be married
- the status of persons who are to be married



The provincial government has the power to enact laws concerning the solemnization of the marriage. This includes

- issuing licences and establishing rules to be fulfilled before a licence can be issued
- stipulating residency requirements: Some provinces have enacted laws stipulating that persons reside in those provinces for a certain length of time before they can obtain marriage licences.
- stating the prohibited degrees of **consanguinity** (blood relationship) and **affinity** (relationship through marriage)

**Consanguinity:**  
relationship by blood;  
relationship by a  
common ancestor

**Affinity:** relationship  
by marriage

1. Suggest one reason why provinces would have to issue licences to those who intend to marry.

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2. Fill in which level of government has jurisdiction over the following. Put in an F for federal and a P for provincial.

- \_\_\_\_\_ a. solemnization of marriage
- \_\_\_\_\_ b. marriage licence
- \_\_\_\_\_ c. mental state of persons getting married
- \_\_\_\_\_ d. relationship of persons getting married

Check your answers by turning to the Appendix, Section 1: Activity 1.

## Activity 2: The Engagement

### The Legal Aspects

An engagement is an agreement to marry and is governed by the ordinary rules of contract. All the features and requirements that make a contract binding must be present; there must be an offer to marry – the proposal – and an unconditional acceptance of that offer. The legal consideration in an engagement contract is each party's promise to marry the other.

If the person to whom a proposal has been made waits too long (an unreasonable length of time) or does not give an answer within an expressed time, the other party is released from any obligation. The agreement to marry need not be in writing to be valid.

Any promise of a gift which is made in connection to the marriage must be made in writing to be valid. This requirement is part of the *Statute of Frauds*. Contracts in consideration of marriage include any promise to make a monetary settlement or transfer of property providing a certain marriage takes place. The promise may be made by either party or by a third party such as a parent, guardian, or other relative. For example, a man promises to give his fiancée a car if she will marry him; or an aunt promises a man a partnership in her business if he will marry her niece.





## Breaking the Engagement

Should a couple wish to call off their engagement, they are free to do so since all contracts can be terminated by mutual consent. All gifts given by one party to the other as inducements to the marriage are the property of the person to whom they were given.

However, where a gift has been given by a third party to the couple in contemplation of their proposed marriage, it should be returned to the giver as there is an implied condition that it is given for the marriage. The exception to this rule are gifts of a personal nature that were for immediate personal use (for example, foodstuffs and cosmetics).

The engagement ring need be returned only if the recipient is the one to break the engagement. Any gifts given by one party to the other that were not by way of inducement to the marriage, but rather were gifts conditional on the marriage or in contemplation of the marriage, have to be returned only by the party who is responsible for the breaking of the contract to marry. Most provinces have stated that gifts given in consideration of marriage are to be returned regardless of who broke the engagement.



Of course, as in all contracts, the parties can change the basic terms by mutual agreement.

False and misleading statements or misrepresentations in regard to one's financial situation, health, potency, honesty, and so on are justifiable reasons to break off the engagement. Legally, dishonest persons can be held responsible for any loss that their improper behaviour has caused the other party.

If an individual breaks an engagement without just cause and without the other party's consent, that individual is guilty of a breach of contract. In order to collect damages for such a breach of contract it must be shown that the claimant has suffered a financial loss – such as giving up a job, buying furniture, or moving to another city – in reliance on the promise of marriage. After a long engagement a woman's lessened marriage eligibility can also merit compensation, although this factor is no longer of the same importance as it was when women usually did not work outside the home for a living.

The party who unjustifiably breaks an engagement cannot be legally compelled to marry the other party as this would be a marriage under duress.

1. Mr. Grabsky met Ms. Jodes and they became engaged. He gave her a gold bracelet when he asked her to marry him. He later bought her an expensive engagement ring. He also bought her a mink coat as a Christmas present. Because of problems that developed in the relationship, Grabsky broke the engagement, although Jodes wanted to use counsellors and mediators to help resolve their differences. Grabsky sued for the return of the previously noted gifts, valued at \$40 000. He also sued for the value of his own sheepskin coat, two suits, and several hockey skates. He had left these clothes at her apartment, and when he broke the engagement, she threw them out.

a. By law does Jodes have to return the first engagement gift, the engagement ring, and the Christmas gift? Explain.

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b. Should Grabsky be able to receive compensation for his clothing and equipment that Jodes disposed of? Explain why or why not.

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2. Suggest **three** examples of false and misleading statements that may be grounds for breaking an engagement to be married.

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Check your answers by turning to the Appendix, Section 1: Activity 2.



### Activity 3: Requirements of a Marriage

#### Legal Requirements

For a marriage to be valid in Alberta the following criteria must be met.

- **statutory formalities**

In Alberta you must obtain a marriage licence. A blood test is not required. A licence must be accompanied by a sworn statement testifying that there are no circumstances that make the parties ineligible to marry. There is no obligatory waiting period either before or after the licence is purchased.



- **mental and physical capacity of both parties**

Both parties must be sane and able to engage in sexual relations.

- **freedom of both parties to marry**

Neither party can be married at the time of the marriage ceremony. If either party has been previously married, a final divorce decree must have been obtained and presented as proof of divorce. The death certificate of a previous spouse may be requested.

- **permitted degrees of consanguinity and affinity**

A person cannot marry anyone with a blood relationship that is too close. This is because of the physical and mental disorders that have frequently been found in the offspring of persons who are closely related. A relationship created by marriage is one of affinity. A marriage between persons related within the prohibited degrees of consanguinity or affinity is held to be absolutely null and void.

The following chart lists relationships that prohibit marriage.

A man may not marry his	A woman may not marry her
grandmother grandfather's wife wife's grandmother aunt wife's aunt mother stepmother wife's mother daughter wife's daughter son's wife sister granddaughter grandson's wife wife's granddaughter niece nephew's wife	grandfather grandmother's husband husband's grandfather uncle husband's uncle father stepfather husband's father son husband's son daughter's husband brother grandson granddaughter's husband husband's grandson nephew niece's husband

- **mutual free consent to a marriage**

Persons must not be marrying because of the fear of duress. Duress, as in contract law, means the use of force or the threat of force.



- **proper age**

In Alberta you must be at least eighteen years of age to marry without your parents' consent. No persons under the age of sixteen may marry with the exceptions of pregnant females or the mothers of living children. The marriage of these underage persons requires a parent's consent or a court order.

- **the marriage ceremony**

A marriage ceremony must be performed by a properly registered ordained member of a religious body or by a marriage commissioner in a civil ceremony. There must be two witnesses present in addition to the bride and groom and the person conducting the ceremony. If the prospective bride or groom does not clearly understand the language in which the ceremony is conducted, an interpreter must be present to clearly explain the meaning of the ceremony.

The marriage ceremony does not have to follow any particular format but part of the ceremony must include the following.

- A solemn declaration must be made by both parties to the effect that they know of no legal reason why they should not be married.
- Each person must declare before the people present that he or she takes the other to be his or her lawful wedded spouse.
- The officiator must pronounce the couple husband and wife.
- After the ceremony the officiator, the couple, and the witnesses must sign the marriage register and a statement of marriage.

If the parties to a marriage performed in good faith are not under any legal disqualification (consanguinity or undissolved marriage ties) and have lived together after the ceremony as husband and wife, such a marriage will be deemed valid in spite of any irregularities that might be revealed later. An irregularity might occur, for example, if the licence has not been issued correctly, the person solemnizing the marriage has not been properly authorized, or any required parental consent is lacking.





I guess the idea is not to break up a good marriage over a technicality.

1. Why would circumstances occur whereby consent to a marriage has to be given through a court order?

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2. The courts will consider a marriage to be valid if the parties acted in good faith, were not under a legal disqualification, and lived as husband and wife after the ceremony – even if irregularities were found later. Suggest a reason for this.

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3. A marriage ceremony does not have to take any particular form, but four things must occur at it. What are these four things?

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Check your answers by turning to the Appendix, Section 1: Activity 3.

### Change of Name

A woman no longer has to take her husband's surname as her own. She may keep her birth surname after her marriage. She can also hyphenate her surname and her husband's surname and use it as her own. So if Marie Tremblay marries Orest Babiuk, she can call herself Marie Tremblay, Marie Babiuk, or Marie Tremblay-Babiuk.

If a woman takes her husband's surname and later wishes to revert to her own birth surname, she can easily do this by simply starting to use her birth surname again.

Though it is not common, a husband may take his wife's surname upon marriage.

## The Marriage Contract

A marriage contract is a legal agreement between a husband and wife during their marriage or between a man and woman who are about to get married. It sets out certain terms and conditions about the marriage and may also include plans in case the couple later separates.



The types of concerns usually addressed are as follows:

- ownership of property
- support obligations
- sharing of assets during the marriage
- division of assets if the marriage fails
- the education and upbringing of the children

A couple may include anything else that they want as long as both of them agree to the items.

Some items that may be included in a marriage contract but that will not be enforceable by the courts are these:

- personal services such as taking out the garbage, performing kitchen duties, doing the laundry, and so on
- custody of the children in the event of marital failure: The courts will always try to do what is best for the children rather than what is best for the parents.



A marriage contract is like any other legally binding contract in that it must contain all of the essential elements. The contract must be written, signed by the two parties involved, and witnessed.

A marriage contract should make some allowance for conditions of change within the marriage or have a clause stating that it should be reviewed at predetermined intervals. A clause stating that the contract would be null and void after a divorce will protect both parties.

4. Suggest a good reason, aside from material goods and benefits, to have a marriage contract.

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5. Marriage contracts are becoming more popular. Why do you think this is so?

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6. Eleanor and Arvind drew up a marriage contract in which they stated that Eleanor would always do the laundry and Arvind would always mow the lawn. Is this portion of the contract enforceable in a court of law? Explain your answer.

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7. Do you like the idea of marriage contracts? Explain your reasons.

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Check your answers by turning to the Appendix, Section 1: Activity 3.



*Annulment: the making of something – such as a marriage – legally invalid or void*

### Activity 4: Annulment

An **annulment** does not dissolve an existing marriage but rather declares that the marriage was not lawfully performed or that the marriage union was never completed. Such marriages are either void (never existed by law) or voidable (recognized but may be declared invalid if one of the parties so wishes).

An example of a voidable marriage is one in which the marriage has not been consummated (that is, in which sexual relations have not occurred). It is still a marriage unless one spouse complains to the court. The official court declaration that must be applied for is the *Decree of Nullity*.

The grounds for an annulment include the following:

- **lack of legal capacity**  
If either party was underage, intoxicated, mentally defective, or already married, or if the parties were closely related, there are grounds for annulment.
- **lack of genuine consent** (mistake or duress)  
An example of a mistake would be a person from another country thinking that it was only an engagement ceremony rather than a marriage. An example of duress would be the forcing of a young person into marriage by his or her parents.
- **grave defect in the ceremony**  
A service performed by a person not legally qualified to do so would not be legal.



- **lack of consummation**

If either party is unable or unwilling to engage in sexual relations, the other party may file for annulment. Impotence (inability to have sexual intercourse) occurring later in the marriage is not grounds for annulment, but it may be grounds for divorce.

- **fraud**

This is one of the most frequently used grounds for annulment and occurs usually when someone consents to a marriage because of a misrepresentation or concealment of some vital fact by the other party. The fraud must have been important enough that it affects the foundation of the marriage itself and must have been of such impact that, had the consenting party known of it, that party would have refused consent to the marriage.

The following are instances of fraud that may be successfully used as grounds for annulment.

- misrepresentation as to age, character, and habits  
Examples of this are the denial by one party of a criminal record for sexual assault or narcotics addiction. A previous conviction of impaired driving cannot, however, be used as grounds for annulment.
- misrepresentation as to financial condition and social position  
Fraud as to such matters as social and financial position is not normally grounds for annulment. However, if one spouse were a professional swindler, the resulting misrepresentation could constitute grounds.
- misrepresentation as to identity  
If there has been false impersonation of the intended spouse, an annulment can result.
- concealment of disease or misrepresentation of good health  
The concealment of serious contagious diseases such as tuberculosis or AIDS can lead to annulment. However, concealment of a disease like arthritis cannot constitute grounds.
- concealment of incapacity to bear children  
If either spouse is infertile and is aware of this fact, it must be disclosed before the marriage. If either spouse is unaware that he or she cannot have children, however, the inability does not constitute grounds for annulment.
- concealment of pregnancy  
In those cases where the wife becomes pregnant by a man other than the husband, and where the husband has not had sexual intercourse with her before the marriage, the courts will grant an annulment.



In other words, it's not easy to get an annulment because of fraud. The fraud has to be pretty serious.

1. Jane Doe met Baron Van Massey, and after three months they married. Jane thought that "Baron" was a title and not a first name. After the marriage, he took her to his home in a slum. She applied for an annulment. Would she be successful? Explain why or why not.

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2. Shauna Martchenko, age seventeen, became pregnant. She and her boyfriend did not wish to get married. Their parents, however, put a great deal of pressure on them. Shauna's mother was especially upset, swearing that she would see her daughter dead rather than have her bring so great a shame on the family.

Shauna married her boyfriend, but soon applied for an annulment. Would she be successful? Explain your answer.

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3. Alonzo Racicot came from a large family and always dreamed of having many children of his own. He married Anne-Marie Wilson, who also intended to have many children, bought a big old farmhouse to accommodate their offspring, and began waiting for child number one. When Anne-Marie failed to become pregnant, both parents had fertility tests done and learned to their horror that Anne-Marie was sterile. Alonzo filed for an annulment.

Would he be successful? Explain.

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Check your answers by turning to the Appendix, Section 1: Activity 4.

### Activity 5: Rights and Responsibilities of Marriage Partners



Marriage creates a bond between two individuals that carries with it legal rights and obligations. Spouses are required by law to take care of and provide necessities for each other. Furthermore, many laws treat married persons in a different fashion than they do single people. It is therefore necessary to review the laws affecting married persons' liabilities and rights.

#### Consummation

Both parties owe each other a reasonable amount of sexual relations.

## Contracts Between Spouses

A husband and wife are legally free to enter into contract with one another and equally free to sue one another for breach of contract.

## Undue Influence

If one spouse enters into a contract with the other and it turns out to be unfavourable, that spouse can claim undue influence. The courts believe that a spouse will often enter into unfavourable contracts of a business nature out of love or fear or for the other's benefit. A spouse will, however, lose the right to plead undue influence if the contract was entered into on the advice of an independent lawyer.

## Torts and Crimes

Spouses are liable to pay damages for any torts against third parties but not for those committed against their spouses. One spouse can, however, lay criminal charges against the other. An example would be assault.

A husband and wife cannot commit the crime of conspiracy with one another. It takes at least two to conspire and a husband and wife are considered as one.

*Accessory after the fact: someone who protects someone known by that person to have committed a crime*

Married persons cannot be **accessories after the fact** to crimes committed by their spouses.



So if I got married and my husband robbed a bank, I guess I could take him in and not report him to the police – and I wouldn't be criminally liable.

Subject to certain exceptions listed in the *Canada Evidence Act*, one spouse cannot be compelled to give evidence against the other in a criminal trial.

## Privileged Communications

Communications between spouses during *coverture* (while living as husband and wife) are privileged. This means that neither spouse can be compelled to tell what was said by the other.

## Creditor's Claims

A spouse is not automatically responsible for the other's debts or obligations. Some exceptions to this apply

- if a spouse has agreed in writing to guarantee the other spouse's loan or other obligation after receiving independent legal advice
- if the debtor has violated any of the bankruptcy laws that exist for the protection of creditors

### Example

A wife has paid everything owing to her husband before fulfilling her obligations to other creditors. This is known as *undue preference*.

- if one spouse has effected a fraudulent conveyance

### Example


A husband in debt transfers all his assets to his wife's name before declaring bankruptcy. In a bankruptcy case assets must have been transferred at least one year prior to declaring bankruptcy.

- if one spouse enters into a reasonable contract for household necessities such as food, supplies, or emergency repairs; in such a situation that spouse is the other's assumed agent



## Property Rights

It is interesting to note that until 1871 upon marriage a man automatically became the owner of practically all that his wife possessed. Today, neither person loses ownership of his or her belongings to the other.



Ah, the good old days!

Indicate whether each statement that follows is true or false by putting a T or an F in the blank to the left of each statement.

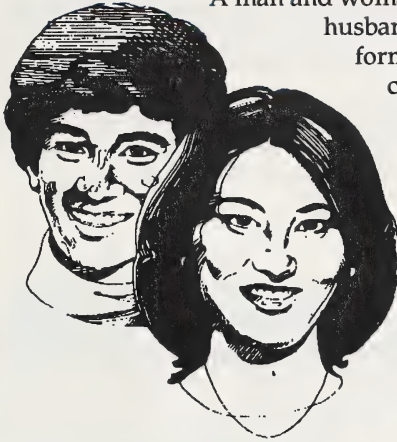
- \_\_\_\_\_ 1. Non-consummation can be grounds for an annulment.
- \_\_\_\_\_ 2. Upon marriage a man automatically becomes the owner of all of his wife's possessions.
- \_\_\_\_\_ 3. Spouses may sue each other for breach of contract.
- \_\_\_\_\_ 4. Spouses may sue each other for the tort of slander.
- \_\_\_\_\_ 5. A husband is automatically responsible for his wife's debts.
- \_\_\_\_\_ 6. A wife is her husband's assumed agent when entering into a contract for household necessities.

Check your answers by turning to the Appendix, Section 1: Activity 5.



*Common-law marriage: the relationship of a man and woman who live together as husband and wife but who have not gone through a legal marriage ceremony*

## Activity 6: Common-Law Relationships



A man and woman who live together in a relationship as husband and wife but who do not go through a formal marriage ceremony have what is commonly called a **common-law marriage**.

By law they are not considered to be married, but in some areas of the law they may have the same rights and responsibilities as legally married persons.

### Rights within a Common-Law Relationship

Under the federal laws, there is no guarantee to a person in a common-law situation that his or her partner will be considered to be a spouse. On the other hand some laws may impose duties on a person living common law that that person may not wish to assume. Such laws vary from province to province.

### Support

In some provinces (such as Ontario) if partners have been cohabiting as husband and wife for five years, they have the same responsibility to support each other as they would if they were legally married. In other provinces the time varies between one year and five years. In Alberta one partner is never legally responsible for support of the other no matter how long they have lived together.

### Property

In a common-law relationship property belongs to the person who paid for it, just as if two friends were sharing accommodation. One partner may have some property rights against the other for contributions of work and household maintenance.

### Example

Greta lived in a common-law situation with Louis for five years. During that time she worked hard to help Louis establish his cabinet-making business. She did all the cooking and housework and contributed many hours at the office doing secretarial, clerical, and bookkeeping jobs.

When Greta and Louis decided to break up, Louis had a prosperous business and Greta had nothing. She went to court and Louis was made to compensate Greta for her contributions.

### Inheritance

In a legal marriage if one spouse dies, the other has an automatic claim against the deceased spouse's estate as well as the right to remain in the matrimonial home until death. A surviving common-law partner has no automatic rights to any inheritance unless named in the other's will. The living partner will also have to vacate the home if it was in the other's name.

### Pensions

Both the *Canada Pension Plan* and the *Workers' Compensation Act* give some recognition to a common-law relationship. They provide for payment of benefits to the surviving partner when the other dies. The *Canada Pension Plan* requires partners to have lived together three years if they cannot marry because of an existing marriage or one year if both are free to marry.

### Criminal Law

Under criminal law, common-law partners are not considered married and have none of the benefits of the protection that spouses have. They are considered to be single persons.

1. June Thibault lived in a common-law relationship with Sven Halvorsen, and they successfully built a business over twenty years. At the dissolution of the relationship would June have legal claims to the business if it was in Sven's name? Explain.

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2. Ilsa and Frank were living in a common-law situation when Frank was arrested for armed robbery. During his trial the crown attorney wanted Ilsa to provide testimony that would help convict Frank. Could Ilsa refuse on the grounds that she could not be made to give evidence against her common-law husband? Explain why or why not.

Check your answers by turning to the Appendix, Section 1: Activity 6.

## Follow-up Activities

If you had difficulties understanding the concepts in the activities, it is recommended that you do the Extra Help. If you have a clear understanding of the concepts, it is recommended that you do the Enrichment.

### Extra Help

#### A Brief Summary

A marriage is a contractual situation; the laws governing marriage are controlled in part by the federal government and in part by the provinces.

An engagement is an agreement to marry and is governed by the ordinary laws of contract. If an engagement is broken by one party, a breach of contract has occurred, and the other party has legal rights regarding financial losses, gifts, the engagement ring, and so on.

There are very strict laws about who may marry whom and what constitutes a legal marriage. Marriages may be nullified if these laws are broken. As well, some sorts of fraudulent misrepresentation can lead to the annulment of a marriage.

Once married, a couple is bound by laws that convey to the partners certain rights and responsibilities. Often the law treats a married couple differently from the way it treats unmarried people.

Some couples choose to live in common-law marriages. Such relationships, though not true marriages, entail their own rights and responsibilities, though these differ from province to province. It is the responsibility of persons living common law to learn what these rights and responsibilities are.

1. Indicate whether each statement that follows is true or false by putting T or F in the space provided to the left of each statement.
  - \_\_\_\_\_ a. The legal consideration in engagement contracts is each party's promise to marry the other.
  - \_\_\_\_\_ b. The agreement to marry must be in writing to be enforceable.
  - \_\_\_\_\_ c. A promise to marry is legally binding on a minor.
  - \_\_\_\_\_ d. If one party breaks the engagement without just cause and without the other party's consent, that party is guilty of a breach of contract.
  - \_\_\_\_\_ e. It is illegal to issue a marriage licence to any person who is mentally ill.
  - \_\_\_\_\_ f. The clergy are entitled to a fee of \$100 for performing a marriage ceremony in Alberta.
  - \_\_\_\_\_ g. A husband and wife cannot commit the crime of conspiracy with one another.
  - \_\_\_\_\_ h. If a man, without legal justification, breaks off an engagement to be married, he can still demand that the engagement ring be returned to him.
  - \_\_\_\_\_ i. An annulment order dissolves an existing marriage.
  - \_\_\_\_\_ j. If a prohibited degree of relationship is found to exist between two people, their marriage is void.
  - \_\_\_\_\_ k. Sterility is always grounds for annulment.
  - \_\_\_\_\_ l. Alberta law recognizes common-law unions as valid marriages.
  - \_\_\_\_\_ m. In common-law relationships all property is divided equally between the two parties should they decide to separate.

2. Fill in the blank spaces in the following statements.

- a. An engagement is an agreement to marry and is governed by the ordinary rules of \_\_\_\_\_.
- b. Any promise of a \_\_\_\_\_ that is made in connection with a marriage must be in writing to be enforceable.
- c. The party who unjustifiably breaks the engagement \_\_\_\_\_ be legally compelled to marry the other party.
- d. The parties to a marriage must not be related within the prohibited degrees of \_\_\_\_\_ or \_\_\_\_\_.
- e. No person under the age of \_\_\_\_\_ may be married in Alberta except for a pregnant female or the mother of a living child.
- f. There must be \_\_\_\_\_ witnesses present at the marriage ceremony.
- g. A husband and wife are legally free to enter into \_\_\_\_\_ with one another.
- h. Communications between husband and wife during coverture are \_\_\_\_\_.
- i. The most frequent exception to the general rule that one spouse is not responsible for the other's contract is the case where a wife enters into contractual obligations in the capacity of her husband's \_\_\_\_\_.
- j. A wife is her husband's assumed agent when entering into reasonable contracts for \_\_\_\_\_.
- k. \_\_\_\_\_ marriages are those which, from a legal point of view, never existed.



- l. One of the most frequently used grounds for annulment is that of \_\_\_\_\_, which is based on a misrepresentation or concealment of some vital fact by one of the parties.
- m. Under the \_\_\_\_\_ Act a common-law spouse in Alberta may receive compensation upon the death of his or her partner.

Check your answers by turning to the Appendix, Section 1: Extra Help.

### Enrichment

1. The number of common-law marriages has increased dramatically in the last decade or two as society's values and attitudes have changed. This has, of course, created legal problems: how should the law treat unmarried couples living as husband and wife?

As you have seen, laws governing common-law relationships vary somewhat from province to province. Go to your library and research the laws as they now stand in your province. Your librarian will be able to direct you to relevant material.

If the topic really interests you, try to arrange an interview with a social worker or a family-law lawyer. Remember to prepare a list of questions in advance if you do conduct an interview. Use a tape recorder or notepad to record your interviewee's comments.

When you've finished your research, write up your findings in a short research paper. If you are in a classroom, ask your learning facilitator if you can present your paper to your class. It should make for an interesting discussion.

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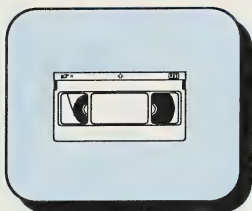
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2. The Section 4 Enrichment activity of Module 2 recommended that you watch a videotape from the ACCESS series *You and the Law*. There are several tapes in this series that apply to the material covered in Module 3; if you can acquire them, it would be worth your while to watch them.

At this point the most helpful tape in the series would be *Marriage and Common Law*, though it would be just as appropriate to view it after doing Section 2 of this module. If you can watch this tape, keep an eye out especially for the differences in the rights that exist in a marriage and a common-law relationship.

Check your answers by turning to the Appendix, Section 1: Enrichment.

## Conclusion

Though at heart marriage is a relationship based on love, understanding, trust, and commitment, it is also a legal, contractual situation. There are many laws governing such things as engagement, the marriage ceremony, rights and duties of spouses, annulment, and common-law relationships. It is important for a couple contemplating marriage to be aware of the legalities of their situation.

Assignment  
Booklet

## ASSIGNMENT

Turn to your Assignment Booklet and do the assignment(s) for Section 1.



## Desertion, Separation, and Divorce



**H**ow many marriages do you know that have ended in divorce or separation? The rate at which marriages fail seems to be ever increasing. This is a situation with which our courts and lawmakers must deal.

There are several ways to end a marriage; they range from simply living apart to obtaining judicial separation, annulment, or divorce. When a married couple separates, whether informally, with a separation agreement, or by judicial separation, the marriage has not been legally brought to an end. The couple has simply stopped living together. An annulment or divorce, on the other hand, will end a marriage and give the parties the right to marry again.

After completing this section you should be able to

- distinguish between legal separation and divorce
- discuss a separation agreement
- discuss support obligations
- outline the grounds for a divorce
- outline the procedures involved in obtaining a divorce
- discuss the areas of consideration for division of matrimonial property





***Desertion:** the physical absence of one partner in a marriage with the intention not to return*

***Cohabitation:** the situation in which a couple live together as husband and wife*

## Activity 1: Desertion

Probably the simplest way for a marriage to break apart is through **desertion**. Desertion puts an end to the couple's cohabitation.

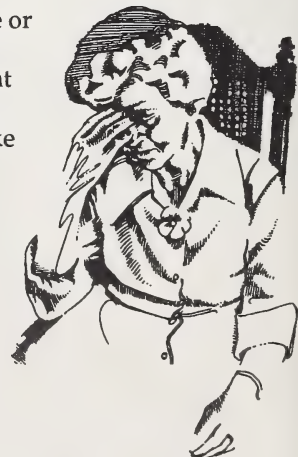
**Cohabitation** occurs when a man and woman live together in the same place while rendering each other both sexual and social companionship and each one performs the normally expected household responsibilities. Desertion is deemed to have taken place when all these features have terminated. To constitute desertion, in other words, a physical separation between both persons must have taken place.

In addition to physical absence, there is a second vital element of desertion – the intention not to return. This intention is assumed to exist in absent spouses unless a satisfactory explanation is established.

The following are grounds for being absent without committing desertion:

- absence on business
- absence resulting from seeking employment
- absence required for the good of one's health
- absence resulting from the absent spouse's insanity at the time of leaving
- absence caused by imprisonment or attempts to evade it (However, failure to return home after being released from prison is considered to be desertion).

To constitute desertion, the one person's departure or absence must have taken place without the other's consent, either expressed or implied. It follows that in order for the claim of desertion to succeed, the deserted person must, at all times, be willing to take back the deserter. By refusing a genuine offer to return, the deserted spouse is consenting to the separation by implication, with the result that the absence no longer constitutes desertion.



1. Briefly define *cohabitation* in your own words.

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2. What are the two elements necessary to constitute desertion?

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Check your answers by turning to the Appendix, Section 2: Activity 1.

## Activity 2: Separation

Another way in which a couple can put an end to a cohabitation that they no longer consider desirable is **separation**.

There are three basic methods of achieving separation:

- **living apart**

In this situation no legal agreement is drawn up. The couple only live apart from each other.

- **legal separation**

This is a form of separation of spouses whereby a legal document or agreement is drawn up with the assistance of a lawyer.

- **judicial separation**

A spouse can request a judicial separation from the courts. This would occur usually in a case of desertion, assault, or adultery. One spouse would request the separation agreement if the other refused to agree to a separation.

*Separation: the termination of cohabitation by mutual agreement or judicial decree*

A separation is often the first concrete sign of marital breakdown. Separated couples can either get back together or apply to the courts for a divorce. After separation, they can stop proceedings at any time before the final divorce decree; after this they will have to remarry to be legal spouses once again.

## Reasons for a Judicial Separation

Following is a list of reasons for which a judicial separation may be requested:

*Petitioner: one who applies to the court, e.g., the spouse who applies for a divorce or judicial separation*

- The **petitioner** does not believe in divorce on religious or other grounds.
- It is not possible or it is too difficult or expensive to get a divorce.
- It might be to the petitioner's financial advantage to remain married to a spouse who is likely to predecease the petitioner.
- The required length of time that would entitle the parties to divorce has not yet lapsed.
- The petitioner hopes for a possible reconciliation in the future.

## The Separation Agreement

A separation agreement is a contract enforceable by the courts. It is recommended that separation agreements be drawn up with the assistance of a lawyer.

Such an agreement will usually outline the following:

- an agreement for the parties to live apart and not annoy each other
- the division of property and assets
- financial provisions (one spouse providing for the other)
- a provision for custody of the children and access to them by the spouse who is not granted custody
- a cost-of-living clause



A separation agreement has several advantages. Here are a few:

- As it is an agreement to live apart, neither party can sue for desertion.
- It allows the supporting spouse to deduct support payments for purposes of income tax.
- It will usually lead to easier divorce proceedings if both parties agree to a settlement in a separation agreement.
- It is more flexible than a court order.

There are, however, some disadvantages to a separation agreement. A few are suggested here:

- It can take a long time and can be expensive to enforce if one partner decides not to abide by the terms.
- The settlement agreement does not end the marriage. A divorce must still be applied for if the couple decides to terminate the marriage completely.
- Both parties must consent to the agreement. No part of the agreement can be forced on the other.
- It will be difficult and expensive to change as a lawyer will have to be contacted again.

The separation agreement is usually used by the courts as the divorce agreement if the couple proceeds with a divorce later; however, the divorce court judge will order changes if some points are not set according to the laws set forth by the *Divorce Act* or if the judge feels one partner will be left at a disadvantage.



Separation can be a very trying event in a person's life.

1. What are the three basic types of separation?

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2. List **five** provisions that may be included in a separation agreement.

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3. Quentin and Gisela have a separation agreement drawn up. One of the stipulations agreed to is that Gisela will not take a part-time job but will stay at home to look after the three children. Three months after the separation, Quentin finds out that Gisela is working six hours a night, six days a week as a barmaid in a beer parlour. The children are looked after by their grandmother during these times.

What effect do you think Gisela's actions will have on the separation agreement? Explain.

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Check your answers by turning to the Appendix, Section 2: Activity 2.



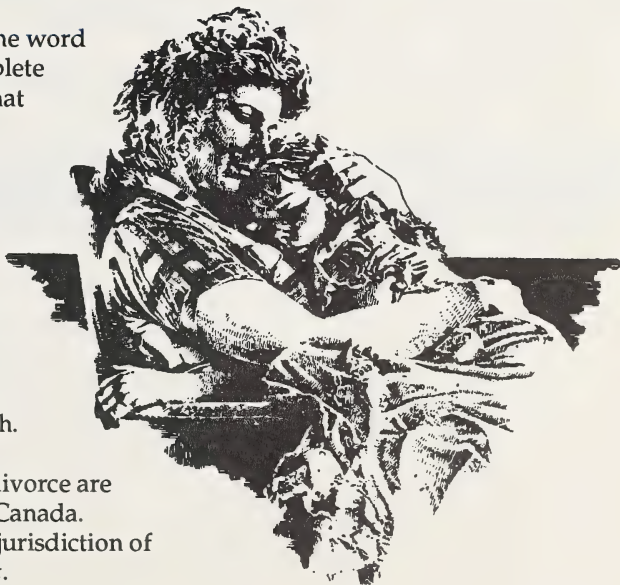
*Divorce: the legal dissolution of a marriage*

### Activity 3: Divorce

In its broadest sense the word **divorce** means a complete separation of things that had been closely connected.

In its legal sense a divorce is a procedure that dissolves an existing marriage and gives the persons involved the right to remarry if they so wish.

The rules allowing a divorce are the same throughout Canada. They come under the jurisdiction of the federal *Divorce Act*.





## Divorce Proceedings

**Respondent:** a person from whom a petitioner is seeking a divorce or a judicial separation

**Petition for divorce:** the original request to the court for a divorce

**Decree nisi:** an interim court order concerning a divorce

**Decree absolute:** the court order making a divorce final

The spouse who starts divorce proceedings is called the *petitioner* and the other person is called the **respondent**. There may be more than one respondent if the spouse committed adultery with another; that person could be termed the co-respondent.

The first application for the divorce is the **petition for divorce**. The other spouse may also file for divorce against the original petitioner. This would be called a *counter petition*.

At the end of a divorce trial, the judge will issue a *decree nisi*. This is an interim (temporary) court order concerning a divorce. At this time one of the parties involved may either appeal the divorce as a whole or appeal for consideration under some section.

One month after the *decree nisi* the judge will award the *decree absolute*. This is the court order making a divorce final. The marriage no longer exists.

A divorce takes effect on the thirty-first day after the day on which the judgement granting the divorce is rendered. It may take effect sooner if there are special circumstances. An example would be the impending birth of a child either by the wife or the girlfriend of the husband; the courts might allow the divorce to take effect sooner in such a situation so that the expecting couple can marry and the child can be born legitimately.

A married woman who has been divorced may use her married name or revert to her maiden name.

Divorce actions are conducted in the Court of Queen's Bench according to the *Divorce Act*, 1985, which is a federal act applicable to all provinces of Canada.

1. What is the difference between a divorce and an annulment?

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2. Define the following:

a. **Petitioner**

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b. **Respondent**

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c. **Co-respondent**

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Check your answers by turning to the Appendix, Section 2: Activity 3.

## Grounds for Divorce

In 1985 the federal government passed the *Divorce Act*, a federal statute applicable to all of Canada. This act had the effect of liberalizing and simplifying Canada's divorce laws.



That's good! If a marriage isn't working, a couple should be able to get a divorce easily. Why should there be laws making their lives difficult?

That's certainly one way of looking at it. On the other hand, if divorces are too easy to get, won't couples with a few problems tend to split up rather than try to work things out? It takes a lot of effort to make a good marriage, and very liberal divorce laws could result in too few people bothering to make that effort.



Section 8 of the *Divorce Act* of 1985 states that a court may grant a couple a divorce on the single ground that there has been a marriage breakdown.



The breakdown of marriage is established only if

- the spouses have lived separate and apart for at least one year

OR

- the spouse against whom the divorce proceedings are brought has  
– committed **adultery**

OR

- treated the other spouse with physical or mental cruelty

**Adultery:** voluntary sexual relations between a married person and someone other than that person's spouse

Each province has residence requirements. One spouse has to have been living in Alberta for at least one year to apply for a divorce.

### Bars to Divorce

There are some barriers, or bars, to a divorce. In other words a divorce will not be granted if certain conditions apply under Section II of the *Divorce Act*.

The bars to divorce are as follows:

- **collusion**

Collusion occurs when spouses agree to made-up grounds for a divorce.

- **condonation**

Condonation occurs if a partner's words or actions indicate that that partner has forgiven the other. An example would be if a couple has continued to have sexual relations after one party had committed adultery. The exception to the clause is the case where the couple has tried for a reconciliation after the grounds for divorce were committed. A couple must have lived apart for more than ninety days.

- **connivance**

Agreeing with your spouse that one of you will create grounds for divorce constitutes connivance. An example would be an agreement that one party will commit adultery so that a divorce may be obtained.

- **care of children**

The court must be satisfied that reasonable arrangements have been made for the support of the children. No divorce will be granted until these arrangements are made.

3. What are the two requirements needed to obtain a divorce?

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4. What are the three grounds for divorce in Canada?

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5. What are the four bars to divorce in Canada?

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Check your answers by turning to the Appendix, Section 2: Activity 3.

## Divorce Mediation

Divorce mediation is an option available to couples who feel they can reach a reasonable agreement without lawyers and the expenses that they entail. Such couples meet with a mediator who can be a minister, psychologist, or other neutral third party to decide on an agreement which, after being examined by lawyers, will be legally binding.



## Legal Consequences of Divorce

The following are several matters that frequently cause disputes when a couple seeks a divorce:

- ownership and division of property and debts
- support payments for spouses and children
- custody and access to children

**Matrimonial property:** property owned in common by a married couple

## Matrimonial Property

“Who gets what when we divorce?” This question is uppermost in the minds of most couples who have decided to end their marriages. The rules and laws are defined in the *Matrimonial Property Act*. This is a provincial statute, so it will vary somewhat from province to province.

The *Matrimonial Property Act* gives the court the power to control the division of property owned by divorcing spouses both separately and together according to strict guidelines.



Alberta's *Matrimonial Property Act* presumes that all property acquired during the marriage by both spouses together or apart will be divided equally between the spouses unless it would be unfair to so divide it. The judge must take into consideration thirteen points when deciding how the property should be divided.

- the contribution made by each spouse to the marriage and to the well-being of the family  
This includes work as a homemaker, parent, farm labourer, etc.
- the contribution made by a spouse to any business, farm, or enterprise owned by one or both of them  
This includes contributions, financial or otherwise, made directly or indirectly to acquiring, improving, or managing the enterprise.
- the contribution made by each spouse in acquiring, maintaining, or improving their property
- the financial position of each spouse at the time of the marriage and at the time of the court hearing  
This can include income, earning ability, liabilities (debts), obligations (rent, etc.), property, or other resources.
- the length of the marriage
- whether the property was acquired while the two parties were living separately
- any oral or written agreement made between the spouses
- whether a spouse gave away or transferred property to a third person
- whether the property had already been transferred between the spouses either by gift, by agreement (e.g., separation agreement), or by another Matrimonial Property Order
- the terms of any previous court order
- any tax liabilities of one spouse which may result from the transfer or sale of property
- whether one spouse has got rid of any property to the disadvantage of the other spouse
- any other relevant circumstance

In other words, what a person owns in his or her own name is that person's to control during the marriage. However, if the marriage fails and the couple cannot agree on how the property should be split, a judge can decide how property gained during the marriage is to be most fairly divided. The only way to prevent the court's control of the property division at marriage breakup is for a husband and wife to have drawn up a marriage contract that states their desires concerning property rights.

In Alberta a spouse may apply for a Matrimonial Property Order only if the habitual or last joint residence of the spouses is in Alberta. A Matrimonial Property Order can be granted only if an annulment, a divorce, or a judicial separation has been granted.

### Support Obligations for Spouses and Children

**Alimony:** payments made by one spouse to the other while the couple are separated but still married

**Maintenance payments:** payments made by an ex-spouse to his or her former spouse after an annulment or divorce

In Canada, **alimony** consists of payments made by one spouse to another while the couple are separated but still married. Payments made to the spouse after the divorce or annulment are called **maintenance payments**. (In the United States the word *alimony* is generally used for both sorts of payments.)

A spouse can receive these payments if one of the following criteria is met:

- It was agreed to in the separation agreement.
- A spouse has been deserted and applies to the courts for maintenance.
- A spouse is forced to leave because the other spouse refuses to provide the necessities of life or because of cruel treatment.

In Alberta if a spouse is to be ordered to pay maintenance, it must be proven that that spouse can financially pay support and that the other spouse is indeed in financial need.

Support payments can be changed if the circumstances of the divorced parties change.



### *The Maintenance Enforcement Act*

Sometimes an ex-spouse does not want to make support payments. This can cause a great deal of hardship for the other ex-spouse, especially if there are children to support.



In order to address this situation, the Alberta government passed the *Maintenance Enforcement Act*, which came into effect in 1986.

This act allows the spouse receiving maintenance to register with the director of maintenance enforcement. It will then be the duty of the director to see to it that the maintenance orders are enforced. The supporting spouse will then have to make all maintenance payments directly to the director who, in turn, will forward the payments to the other spouse.

This law gives the director powers that otherwise would not exist. The director has access to certain government banks of information that will aid in locating non-paying spouses as well as their assets.

The director also has the power to garnishee (see Module 1) the wages of the spouse to pay a support order. This means that a court order is sent to his or her employer and the employer must deduct a certain amount from the employee's salary and send it to the director before paying the employee. The employer cannot in any way penalize the employee for this.

### Canada Pension Plan

A spouse in a marriage that has ended in divorce can also receive financial assistance from the Canada Pension Plan. A spouse has the right to request that the Canada Pension Plan points be divided equally between divorcing spouses, but application must be made for this. This is beneficial if one spouse has not worked out of the home and has no pension benefits built up. These benefits must be applied for within three years of the final divorce decree.

6. What advantages would there be to the process of divorce mediation?

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7. One consideration the courts take into account in dividing property according to the *Matrimonial Property Act* is the length of the marriage. Explain why this factor would be considered important.

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8. What is the difference between *alimony* and *maintenance payments*?

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9. What is the purpose of the *Maintenance Enforcement Act*?

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Check your answers by turning to the Appendix, Section 2: Activity 3.

## Follow-up Activities

If you had difficulties understanding the concepts in the activities, it is recommended that you do the Extra Help. If you have a clear understanding of the concepts, it is recommended that you do the Enrichment.

### Extra Help

#### A Brief Summary

Marriages can be brought to an end in a variety of ways.

Desertion occurs when one spouse leaves the other and does not intend to return.

Separation can occur in three ways:

- A couple decides simply to live apart.
- A couple has legal separation documents drawn up.
- A court grants a judicial separation.

Divorce is a legal procedure that dissolves an existing marriage and gives the persons involved the right to remarry if they wish.

The *Divorce Act* of 1985 allows for a divorce on the single ground that the marriage in question has broken down. Marital breakdown is established if one of three criteria is met:

- The spouses have lived apart for at least one year.
- The spouse against whom the proceeding is brought has committed adultery.
- The spouse against whom the proceeding is brought has treated the other spouse cruelly, either mentally or physically.

The provincial *Matrimonial Property Act* lays down rules for deciding how property is to be divided if the parties to a divorce are unable to agree on the division themselves.

Often in the case of a divorce one spouse is required to make maintenance payments to help support the other spouse and any children of which that spouse has custody. If the spouse required to make payments refuses to make them, or makes them irregularly, the provincial *Matrimonial Enforcement Act* allows the wronged spouse to have the maintenance order enforced.

Fill in the blank spaces in the following statements.

1. In a situation where the husband and wife are living apart they would be well advised to have a \_\_\_\_\_ draft a separation agreement.
2. Maintenance for children is usually fixed until the children reach a certain \_\_\_\_\_.
3. An official separation order does not allow either party to \_\_\_\_\_ again during the other's lifetime.
4. A separation can be enforced just like any other \_\_\_\_\_.
5. In addition to being physically absent the second vital element of \_\_\_\_\_ is the intention not to return.

6. The party who starts the divorce proceeding is called the \_\_\_\_\_, and the other party is called the \_\_\_\_\_.
7. Divorce actions are conducted in the Court of Queen's Bench according to the *Divorce Act*, which is a \_\_\_\_\_ act applicable to all of Canada.
8. \_\_\_\_\_ involves voluntary sexual relations by a married person with someone of the opposite sex other than his or her spouse.
9. \_\_\_\_\_ is an agreement, or conspiracy, involving the divorce petitioner that is intended to deceive the court.
10. \_\_\_\_\_ occurs when one marriage partner encourages, aids, or permits the other to perform an act that can be used as a ground for divorce.
11. A decree of divorce is usually granted in \_\_\_\_\_ stages.
12. Three types of separation are \_\_\_\_\_, \_\_\_\_\_, and judicial separation.
13. The court order finalizing a divorce is called a \_\_\_\_\_.
14. Divorce \_\_\_\_\_ is a process whereby a minister, psychologist, or some other third party meets with a couple to work on an agreement.
15. The rules governing the property division in a divorce are set forth in the \_\_\_\_\_ *Act*.
16. If an ex-spouse is not making the required maintenance payments, the other ex-spouse can turn to the \_\_\_\_\_ *Act* for help.

Check your answers by turning to the Appendix, Section 2: Extra Help.

## Enrichment

1. Prior to 1968 there was no *Divorce Act* in Canada. Laws varied from province to province, and adultery was just about the only legal grounds for divorce. The result was that many people in unhappy marriages simply had to put up with them.

The first *Divorce Act* was passed in 1968, but it was roundly criticized almost from the start. In the late 1970s the Law Reform Commission suggested that major changes be made to the country's divorce laws.

The result of this dissatisfaction was the *Divorce Act* of 1985.

Go to your library and research the reasons for the dissatisfaction with Canada's divorce laws prior to 1985 as well as the precise changes in those laws brought about by the new act. Your librarian can direct you in your research.

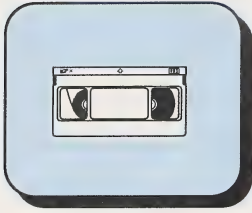
When you've finished researching the topic, write up your findings in a short research paper. At the end of your paper tell whether or not you think the changes in the new *Divorce Act* were good ideas and explain why or why not. What other changes would you like to see made in the divorce laws of our country?

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[illegible]





2. If you did not watch the ACCESS videotape *Marriage and Common Law* in Section 1 but you can get hold of the tape, it would be a good idea to watch it now. In addition, *Divorce*, another tape in the same series, would be appropriate to view at this point. It discusses the changes to the *Divorce Act* of 1985 that made it easier to obtain a divorce, and looks at issues such as dividing property, using a mediator, and arranging for custody of children.

Check your answers by turning to the Appendix, Section 2: Enrichment.

## Conclusion

Marriage unites a man and a woman in a unique legal relationship. Divorce is the end of the legal relationship. Whatever their feelings or religious beliefs, when a husband and a wife get divorced, their legal union is over. In the eyes of the law, they are free to marry other persons. Still, as you shall see in the next section, after a divorce the former husband and wife may continue to have some legal responsibilities to each other and to their children.

Assignment  
Booklet

## ASSIGNMENT

Turn to your Assignment Booklet and do the assignment(s) for Section 2.

## Rights of Parents and Children



**H**ave you ever wondered just what your rights are in respect to your parents or perhaps – if you're an older student – what your rights are in respect to your children?

Section 3 should help clear up any confusion on matters such as these.

After completing this section you should be able to

- identify the legal rights of a child and know how legislation protects these rights
- identify the duties of a parent/guardian
- discuss regulations dealing with children when marital breakdown occurs
- discuss the law in relation to the crimes of children





## Activity 1: Basic Rights of Children

Legally a child is a person under the age of majority – in Alberta under the age of eighteen.

Children have basic rights. These can be broken down into four main categories:

- the right to parents or guardians
- the right to education
- the right to financial support
- the right to protection from harm

### The Right to Parents or Guardians

#### Registration of Parentage

The *Vital Statistics Act* of Alberta states that every birth must be registered within ten days of its occurrence.

The mother is responsible for filling out the birth forms, but if she is incapable, the duty rests with the father or another person.

#### Naming the Child

A child of a married couple must be registered with at least a first name and a surname. There are rules to be followed in naming a child depending on the circumstances of birth.

- **married parents**

It has been customary to give the child the husband's surname. However, now the *Vital Statistics Act* allows changes

- when both parents use the same surname

With parental consent the baby's surname can be the surname used by both, the mother's maiden surname, or a combination of both surnames hyphenated or combined.

- when both parents use their own surname

With parental consent the baby's surname can be their father's surname, their mother's surname, or both surnames hyphenated or combined. The legal preference is for the hyphenated names to be in alphabetical order.

- **married mother (husband not the father)**  
The baby will carry the mother’s surname and no particulars of the father will be given.
- **unmarried mother**  
The baby will carry the mother’s surname.
- **paternity accepted by birth father**  
In the two preceding situations if a man accepts that he is the father of the child, that child can carry the mother’s surname, the father’s surname, or both names combined or hyphenated.
- **parents with hyphenated names**  
If the parents already have hyphenated surnames, only one of the names of the surname is to be used.



1. Mr. Jonathan Smithers married Miss Jennifer Frederick. She took his name and called herself Mrs. Jennifer Smithers. She gave birth to a son.
  - a. What would the son’s surname likely be?  

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  - b. What alternatives are there?  

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2. Loretta Calhoun and Arnold Finklestein had a child. Though the couple were not married, Arnold accepted that he was the child's father. What would the child's possible surnames be?

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Check your answers by turning to the Appendix, Section 3: Activity 1.

### Legitimacy

*Legitimate: born of parents married to each other*

*Illegitimate: born of parents who are not married to each other*

A **legitimate** child is one born of married parents.

Children born of unmarried mothers or of mothers not married to the fathers of the children are called **illegitimate**. There are several laws in which this circumstance of birth does make a difference.

- If natural parents of illegitimate children consequently marry, the children's status becomes legitimate from birth. The children's original birth certificates are replaced with certificates naming both parents.
- Unmarried mothers will be solely responsible for illegitimate children, but married parents are both responsible for the welfare of their children.
- Children of married parents can automatically inherit from both parents whereas illegitimate children have no claims on the estates of their natural fathers unless specifically named in their fathers' wills.

3. Ingrid Schneider and Jerry Potter dated regularly through high school. A couple of months after leaving for college Ingrid discovered that she was pregnant. She carried on with the pregnancy and near the end of her first year of college gave birth to a baby girl whom she named Jenny. Three years later she married Jerry.

a. Will Jenny be considered illegitimate all her life because she was born out of wedlock?

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b. If not, when will her status change?

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c. Will her birth certificate show that she was born out of wedlock?

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Check your answers by turning to the Appendix, Section 3: Activity 1.

### The Right to an Education

It is the law that every child between the ages of six and sixteen must attend school. Parents and guardians are obligated to arrange to send their children to school or arrange for some acceptable form of education to be provided. The parents will be penalized if they refuse to comply with the law. When children refuse to attend school or behave in an unacceptable manner at school, parents or guardians can request help from a government agency. A special school may be required.



Children may voluntarily leave school at age sixteen whether or not they have graduated. However, the parents or guardians are not obligated to support the children if they refuse to comply with the parents' authority.



4. If a child is sixteen and graduates from school, are the parents obligated to provide payment for post-secondary education? Explain.

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Check your answers by turning to the Appendix, Section 3: Activity 1.

### The Right to Support

The law states that both parents have financial responsibility for their children. This means that after a divorce, both parents are still expected to contribute money towards their children's upbringing.

Some provincial laws permit a court to order a person to support a child even if the person is not the natural parent of the child. The court defines a *parent* as someone "who has demonstrated a settled intention to treat a child as a child of his or her family."

If a child is not capable of providing for the necessities of life because of a mental or physical disability, upon the child's reaching the age of eighteen the parents will be held responsible to provide care and necessities for as long as they are able.

The Right to be Protected from Harm

Section 2 of the *Child Welfare Act* of Alberta states that children have the right to protective services if there are reasonable and probable grounds that the survival, security, or development of the children is endangered. The following are points of particular concern in this area.

- **abuse**  
If a parent or parents abuse their children or cannot protect the children from abuse, children can be removed from their parents' custody for their own protection. Abuse can be physical, sexual, emotional, or mental.
- **abandonment**  
If parents abandon their children, the state can assume responsibility for the children's care. Necessities of life include food, shelter, and clothing as well as essential medical, surgical, or other remedial treatment as recommended by a physician.
- **child's condition or behaviour**  
If parents or guardians are unable to provide care appropriate to meet their children's needs because of their children's condition or behaviour, the children may be removed from the home and placed in another environment.



5. You sometimes hear in the news about parents' refusing, because of religious beliefs, to give permission for blood transfusions for their ill children. In such cases the attending doctors can apply to the courts for temporary custody of the infants. The courts usually grant this custody.

- a. Why do you think the judges award temporary custody of the children to the medical institution?

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- b. Do you think the rights of the parents are infringed upon in cases like these? Explain your reasons.

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Check your answers by turning to the Appendix, Section 3: Activity 1.

*Ward: a person under the care of a protection agency such as the Department of Social Services*

When a person loses the right to have custody of a child and that child is apprehended (taken) under the auspices of the protection agency, the child is called a **ward** of that agency. In Alberta only the Department of Social Services and the police have the authority to apprehend a child. The minister of Social Services then becomes the legal guardian of that child.





**Child custody:** legal responsibility for a child's welfare

## Activity 2: Marital Breakdown and its Effect on Children

### Custody

In a complete family unit of father, mother, and child, the parents have equal custody of and responsibility for the children. When there is marital breakdown, the children are affected. **Child custody** will usually be awarded to one spouse with access rights given to the other. A custody order is never permanent. Circumstances often change and therefore must be reconsidered.

The parent with custody has the ultimate right for the care, control, and upbringing of the child.

Traditionally children were placed with the mother, as the courts felt that mothers were more inclined to give proper care rather than just affection. The courts called this the “tender years doctrine.” It was the old rule that the mother stayed home. Today, however, when both parents are often career oriented, the rules have changed. The first question of the court is “What will be in the best interest of the child?”

The judge's main concern in deciding child custody will, then, always be what is in the best interests of the child. Often the court will appoint a legal investigator called an *amicus curiae* (whom you will remember from Module 1) to investigate both parents' situations and represent the child's best interests in court by making recommendations to the judge concerning custody.

**Access:** the right of noncustodial parents to visit with their children

When one person is given custody, the other is given access. **Access** is the right of noncustodial parents to see their children at intervals and on certain holidays.

*The Divorce Act* requires that a spouse without custody have the right to information from the spouse having custody regarding the health, general welfare, and education of the children of the marriage.

When awarding custody to one parent, the judge considers the willingness of that parent to provide the other parent with access to the child. The act considers it very important that the child have the maximum possible contact with both parents.





Fathers have a better chance than they once had of winning custody of their children. It is the child's best interest that is the guiding principle in custody decisions.

Other factors that a judge considers include the following:

- the mental and physical fitness of the parents
- the conduct of parents
- the age of the parents in relation to the age and sex of the child
- the future plans of the parents
- the age of the child or children
- the health of the child or children
- the preference of the children if they are old enough to understand the situation

## Joint Custody

*Joint custody: a form of custody in which both parents remain legally responsible for the children though the children may live with only one of the parents*

Increasing numbers of divorcing parents are requesting what is known as **joint custody** of their children. In other words, both parents maintain equal responsibility for, or custody of, the children although the children may, in fact, live mainly with only one of the parents.

There are two types of joint custody. In one type the parents are granted equal time with the children in their homes. The children live for a period of time with one parent and then for the same amount of time with the other parent.

In the other type of joint custody the children remain with one parent but the other has an equal voice in decisions regarding care, upbringing, and education.

1. What would be one disadvantage of the equal-time custody as described in the preceding discussion?

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Check your answer by turning to the Appendix, Section 3: Activity 2.

## Abduction

*Abduction: the carrying off of a person by force*

If you read or listen to the news, you no doubt hear from time to time about cases of child **abduction**. Usually in such cases a parent without custody takes away the children that have been – or are likely to be – entrusted to the custody of the other parent.

Articles like the one that follows, taken from *The Edmonton Journal* (with names changed in respect for the parties involved), are all too common.

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## Mother wanted in abduction of son

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*Child, 5  $\frac{1}{2}$ , missing for a week*

Greg Owens  
Journal Staff Writer  
Edmonton

Police are concerned about a 5 1/2-year-old boy whose mother is wanted in connection with his abduction.

John William Taylor has been missing for a week.

A warrant has been issued charging 34-year-old Phyllis June Taylor of Edmonton with abduction in contravention of a custody order.

John's father, Stanley, says he would settle for any indication that his son is alive and well.

"I'm very very worried about him," said Stanley, who hasn't slept well since his son disappeared.

"All I want to know is that's he's all right ... if I could just speak to him on the phone to hear he is still alive."

John's mother has twice kept him longer than permitted, but never for a week.

Police had to pick up the child the past two times and returned him home to his father.

John's mother was accompanied by a man known as Ben when she disappeared with him, police say. Ben

is white, five feet 11 inches tall with an average build, medium-dark brown hair and a moustache and beard.

The trio left the area in a van covered with red primer paint.

Investigators believe the mother may be in hiding or has fled the area.

Police spokesman Kelly Gordon said police believe the mother may act irrationally if she and not the child becomes the focus of the search.

Stanley said his former wife has had psychiatric problems for which she had received treatment.

John is described as being three feet eight inches tall, weighing 45 pounds, with brown eyes and dark brown collar-length hair.

He was last seen wearing a light blue sweat shirt with a coastal scene on it, dark blue sweat pants, blue-red shoes with Velcro fasteners and a light grey, hooded coat.

Phyllis is described as being white, four feet 11 inches tall, weighing 100 pounds, with green eyes and light brown hair.<sup>1</sup>

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<sup>1</sup> *The Edmonton Journal* for the article "Mother wanted in abduction of son," October 9, 1991, page B2. Reprinted by permission of *The Edmonton Journal*.



If a parent illegally takes a child from the parent who has custody, a criminal offence has been committed – an indictable offence under the Criminal Code. All the provinces in Canada have passed laws enforcing the custody orders of other provinces to stop parents from abducting children and taking them to other provinces to avoid prosecution.

If a parent abducts a child, however, and moves to another country, the parent can be sent back by the authorities only if child abduction is an offence in the other country. In 1980 twenty-nine countries signed the *Convention on the Civil Aspects of*

*International Child Abduction* which set up a system for returning abducted children. Canada was one of the countries that signed the convention, which came into force in Canada in 1983.



Why don't all countries sign it? It seems to be in every nation's interest to have such an international agreement in effect.

2. Suggest a reason why some countries might not wish to sign the convention on child abduction.

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## Maintenance of Children

Both parents have a responsibility to support their children until they reach the age of eighteen unless a child marries or withdraws from parental control at age sixteen.

As you have seen, after a divorce, usually one parent will have custody and the other will be ordered to make support payments to the other for the child. After the breakup of a common-law relationship or of a marriage where the children were not the natural children of one of the parents, a parent can still be ordered by the courts to pay child support. This will occur if it can be proven that the children were treated as belonging to that family unit.



Nonpayment of child support payments can make life difficult for the parent who is awarded custody.



### Activity 3: Adoption

Adoption involves the creation of a legal relationship between a minor and adults who are not the minor's natural parents. When an adoption is finalized, the rights of the natural parents are terminated.

In Alberta, to be eligible for adoption a child must be between ten days and eighteen years old. The adoptive parents must be over eighteen years of age and not more than forty years older than the child they wish to adopt.

In other words, if the child is twelve, the parents cannot be older than fifty-two years of age. If the child being adopted is twelve or older, that child must give consent to being adopted. If the child does not give consent, a court order will have to be obtained to dispense with that consent. The biological parents must give their full informed consent to the adoption.

In Alberta if a mother is single, she does not need the biological father's consent to give up her child for adoption. He cannot prevent her from giving up the child for adoption, but he can apply to the courts for custody if he wants the child and can prove that he is the biological father.

Often after a marriage breakdown a spouse with custody of the children will remarry. Sometimes the step-parent wishes to adopt the children. This occurs often if the natural parent who only has access does not take advantage of the access granted by the courts. That parent must, however, give consent to the adoption. If consent is denied, an application must be made to the courts so that the couple can dispense with the consent.

Before an adoptive child is placed in a home, studies are done by the Department of Social Services to ensure that the home is satisfactory under department standards.

The persons applying to be adoptive parents are called the *petitioners*. When a petition for adoption is presented to a judge, it must be presented with sworn documents stating that the parents are suitable. The judge can grant the adoption order anytime. There is no longer a waiting period in Alberta.

No action can be taken to set aside an adoption after one year. In other words, after one year children cannot be removed from their adoptive parents unless they are not properly cared for.

After the completion of an adoption, the adoption records are sealed and will not be disclosed without the consent of the minister of Social Services or a court order.

When a child is adopted, that child automatically becomes the child of the adoptive parents as if he or she was born to them. A birth certificate is issued naming the adoptive parents as the parents since birth.



An adopted child automatically becomes the child of the adoptive parents as if born to them.

### Adoption Disclosure

*Adoption disclosure:  
the release of  
information about an  
adoption*

**Adoption disclosure** is the releasing of information about an adoption. There are two forms of disclosure.

- Under Section 65 of the *Child Welfare Act*, an application for disclosure of the biological parents or siblings may be made to the minister of Social Services by the following persons:
  - the adopted person, if eighteen years of age
  - the biological parents or adult siblings

If both the adopted person and either the mother, father, or a sibling are registered with the minister and consent to the disclosure, the minister will reveal the identities of each to the other. Both must be registered to have their identities revealed.

- Under Section 67 of the *Child Welfare Act*, the minister may give information that does **not** disclose the identity of adopted children, their biological parents, or their siblings. Such information may consist of medical records, circumstances of birth, or family history.

1. Why would records of adoptions be sealed?

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2. Do you think that after reaching the age of eighteen adopted children should automatically have access to their files? Explain your reasons.

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Check your answers by turning to the Appendix, Section 3: Activity 3.





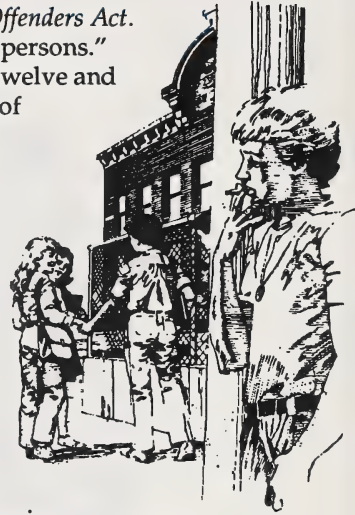
## Activity 4: The Law and Crimes of Children

You have no doubt often heard of the *Young Offenders Act*. This federal act deals with offences of “young persons.” Young persons are those between the ages of twelve and eighteen. If a young person commits a crime, of course the same legal rights accorded adults under the *Charter of Rights and Freedoms* are ensured. Some of these rights are

- the right to be informed of one’s rights
- the right to bail
- the right to hire a lawyer or to obtain legal aid

However, the *Young Offenders Act* provides additional protection to ensure that children and youths are not unduly intimidated by those in authority.

As well as the rights listed in the *Young Offenders Act* are outlines of all the procedures to be followed, possible penalties, and other features in accordance with each crime committed.



### Giving a Statement to Police

Under Section 29 of the *Young Offenders Act* no statement given by a young person to a peace officer is admissible unless

- it is voluntary
- the young person’s rights were explained in language appropriate to that person’s age
- the young person had the opportunity to consult with counsel or parents and make the statement in their presence

Though any statement in accordance with the above criteria may be used in court against a young person charged under the *Young Offenders Act*, there is no obligation to make a statement. If a request has been made for consultations with parents or a lawyer, those people must be in attendance when the statement is made.



Young offenders are people between the ages of twelve and eighteen who have committed an offence.

## Going to Court

Young offenders are not always required to appear in court. They may, upon admitting responsibility for certain offences, be presented with an alternative such as community service work, or a fine. If young offenders are fourteen or older and commit serious offences, they may be transferred to adult court and treated as adults during their trials and sentencing.

If a trial is held, the youth will be found either not guilty (and released) or guilty. Under Section 12 of the *Young Offenders Act* are listed the types of penalties the judge can consider. They are as follows:

- commit the offender to custody
- impose a fine
- order the offender to perform community service
- give the offender a probation order
- impose any of the preceding penalties as well as revoke or cancel any rights, benefits, licences, permits, or privileges held by that young person

## Records

The criminal records of a young offender are available only to the attorney general or to a person authorized in writing by the attorney general. All records of young offenders are sealed five years after the conclusion of the penalty for the offence.

1. Under the *Young Offenders Act* what is the definition of a “young person”?

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2. The maximum sentence for a young offender is three years. Do you think this is fair if a person of seventeen commits a murder? Explain your reasons.

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3. Young persons between the ages of sixteen and eighteen have the same motor-vehicle privileges as adults. However, their possible sentences for violations and crimes while in the care and control of a motor vehicle are not the same as those of adults. Should the law be changed, or should driving be allowed only after the age of eighteen? Explain your reasons, and suggest any alternative solutions you think might work.

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Check your answers by turning to the Appendix, Section 3: Activity 4.



## Follow-up Activities

If you had difficulties understanding the concepts in the activities, it is recommended that you do the Extra Help. If you have a clear understanding of the concepts, it is recommended that you do the Enrichment.

### Extra Help

#### A Brief Summary

A child – legally someone under the age of majority – has basic rights in Canada that can be broken down into four main categories:

- the right to parents or guardians
- the right to education
- the right to financial support
- the right to protection from harm

When a marriage breaks down, children are vulnerable to suffering. Therefore, legal machinery has been created to protect children's rights in such circumstances.

Normally when divorce occurs, one parent is awarded custody of the children, though joint custody is becoming an increasingly popular alternative. In deciding which parent is to be awarded custody, the court's principal concern is what is best for the children, not what is best for the parents.

Children, like adults, sometimes commit crimes. In Canada children under the age of eighteen who commit crimes are normally dealt with under the *Young Offenders Act*, which outlines such things as children's rights as well as penalties to be imposed and court procedures to be followed when dealing with young offenders.

Fill in the blanks in the following statements.

1. In Alberta every birth must be registered within \_\_\_\_\_ days of its occurrence.
2. If a child is born to an unmarried woman, the child will carry the \_\_\_\_\_ name.
3. A \_\_\_\_\_ child is one born of married parents.

4. Every child must attend school between the ages of \_\_\_\_\_ and \_\_\_\_\_.
5. After a divorce \_\_\_\_\_ parents are still expected to contribute money towards their children's upbringing.
6. If parents or guardians \_\_\_\_\_ or abandon children in their care, the state may take over the responsibility of raising the children.
7. Children taken from their parents and placed in the care of a protection agency are called \_\_\_\_\_ of that agency.
8. Both parents are responsible for supporting their children until they reach the age of \_\_\_\_\_.
9. To be eligible to adopt a child in Alberta, adoptive parents must be not more than \_\_\_\_\_ years older than the child they wish to adopt.
10. No action can be taken to set aside an adoption after \_\_\_\_\_ year.
11. The release of information about an adoption is called \_\_\_\_\_.
12. The *Young Offenders Act* deals with people between the ages of \_\_\_\_\_ and \_\_\_\_\_.
13. Young offenders aged \_\_\_\_\_ or older may be transferred to an adult court if a \_\_\_\_\_ crime is involved.

14. Under Section 29 of the *Young Offenders Act* no statement given by a young person is admissible in court unless the young person had the chance to consult with \_\_\_\_\_ or parents and make the statement in their presence.
15. The records of a young offender are available only to the \_\_\_\_\_ or a person authorized by that official.

Check your answers by turning to the Appendix, Section 3: Extra Help.

### Enrichment

What follows is a description of an actual court case that occurred in British Columbia. Read it and answer the questions that follow it.

A couple married in 1971 and separated two years later. Their one son, it was decided, would remain in the custody of his mother.

As the child grew, he experienced social and emotional problems, and his father felt these were due to poor parenting on the mother's part. In 1984, the father applied for custody.

The judge of the trial court awarded custody of the son to the father despite the child's wish to stay with his mother. When the mother appealed this ruling, the Court of Appeal affirmed the judge's decision, principally because the boy's social and emotional state had improved after he had moved in with his father.

In 1987, when the boy was a young teenager, a further appeal on the part of the mother was dismissed, but the next year, during yet another appeal, the court gave custody back to the mother – with whom the child still wanted to live.

1. In what way was the decision of the original trial judge unusual?

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2. Explain why the mother was probably awarded custody in the end.

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3. If you had been the judge in the Court of Appeal, to which parent would you have awarded custody? Explain your answer.

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Check your answers by turning to the Appendix, Section 3: Enrichment.



## Conclusion

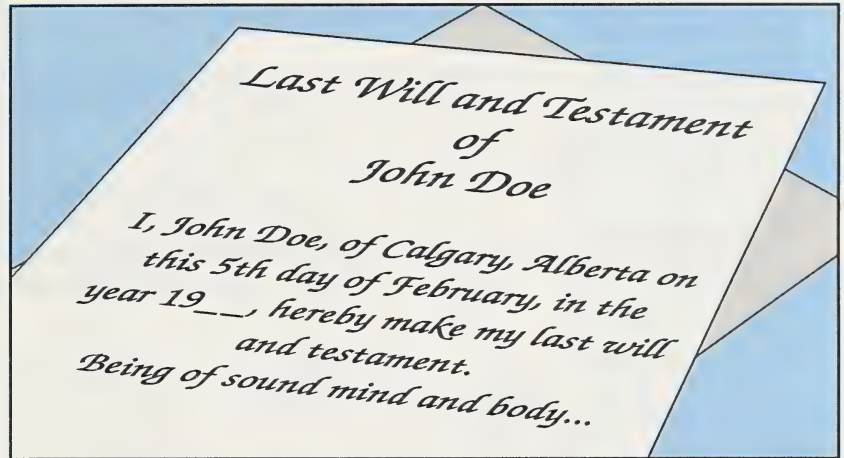
Family relationships are very important, and they can have a great effect on people's lives. As a result there are laws delineating the rights and duties of parents and children. It's especially important that such laws exist when marriages break down and the question of child custody arises.

Assignment  
Booklet

### ASSIGNMENT

Turn to your Assignment Booklet and do the assignment(s) for Section 3.

# Wills and Inheritance



**T**he matter of wills and inheritance came up briefly earlier in the course, but in this, the last section of Law 20, you'll be looking into the issue in greater depth.

Wills are associated with dying – something most of us don't much like to think about. For that reason many people put off drawing up a will. However, people are responsible for gaining assets during their lifetimes and should accept responsibility for the disposal of these assets at their deaths. If you do not have a will, the law will dictate who will get your assets as well as who will have custody of your children. The decision of the courts concerning your affairs may not be as you wished. For these reasons it's very important to draw up a will.

After completing this section you should be able to

- evaluate the benefits of having a will
- identify the legal requirements for preparing a will
- distinguish between a solemn and a holograph will
- assess the various methods of changing, revoking, or cancelling a will
- describe the process of probating a will
- discuss the legal procedures to be followed in distributing property that is left intestate or is bequeathed



## Activity 1: Benefits of Having a Will

### What Is a Will?

A **will** is a legal document that specifies how a person's property is to be distributed after that person's death.

A person who draws up a will is called a **testator** if he is a male and a **testatrix** if she is a female. In the discussion that follows the male term will be used in order to simplify matters.

Persons who receive assets under a will are called **beneficiaries**. Testators usually appoint people to administer and distribute their assets under the terms of their wills. If such a person is a male, he is called an **executor**, and if a female, an **executrix**. Again, in this discussion, we will stick to the term **executor**.

The **estate** of a deceased person is the entire collection of assets and liabilities that person owns at death.

### Reasons for Having (or Not Having) a Will

Everyone over the age of majority should have a will. There are several reasons why people do not have wills:

- **procrastination**  
People feel that they will always have time tomorrow to make out a will.
- **superstition**  
People feel that if they have a will drawn they are inviting death a lot sooner than it would otherwise come.
- **the belief that everything will automatically go to one's own spouse**  
In certain areas such as where there is joint tenancy of a home, this may well happen, but what about other assets or what if both spouses should die at the same time?

Everyone of legal age should have a will, and it is best if it is drawn up by a competent attorney. One way to get a competent attorney is to request the names of firms the trust department of your bank uses in its capacity as executor of wills. The bank would not use these firms if they were not competent in this work.

**Will:** a legal document drawn up by a person specifying how that person's property is to be distributed after death

**Testator:** a male person who draws up his will

**Testatrix:** a female person who draws up her will

**Beneficiary:** a person named to receive a benefit, for example a bequest under the terms of a will

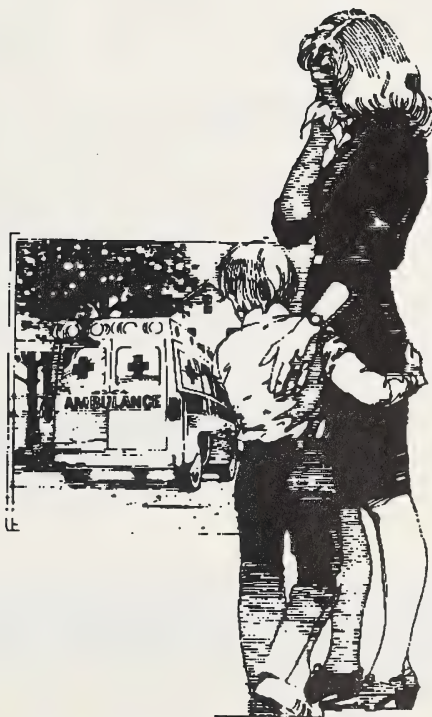
**Executor:** a male person appointed by a testator or testatrix to carry out the terms of his or her will

**Executrix:** a female person appointed by a testator or testatrix to carry out the terms of his or her will

**Estate:** the entire collection of assets and liabilities that a person owns at death

Five important reasons to have a will are that you can

- dictate the manner and amounts in which your property shall be distributed
- provide for the continued well-being of your family and protect them from uncontrolled or unnecessary losses
- create a bigger estate by permitting legitimate savings in things like taxes
- reduce to a minimum the expenses connected with the distribution of your property
- prevent arguments among family and friends as to who should get what



It is important to have a will to ensure that your family will be taken care of as you would wish.



Write down definitions for the following words:

1. **will**

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2. **testator**

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3. **beneficiary**

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Check your answers by turning to the Appendix, Section 4: Activity 1.



## Activity 2: Legal Requirements of a Will

A will takes effect on the death of the testator. There are provincial laws regarding the making and administering of a will. The legal requirements of a valid will in Alberta are as follows.

- Testators must be of legal age unless they are
  - married
  - members of the Canadian Armed Forces
  - sailors at sea
- Testators must be of sound mind. They must know and understand what they are doing.
- Testators must not be under any undue influence or duress. They must be involved in writing their wills, and the disposition of their assets must be their decisions and not those of someone else.
- The witnesses to wills and their spouses may not benefit from the wills they witness.

1. When do the provisions in a will take effect?

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2. Who may be a witness to a will?

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3. Who is the person best qualified to draw up a will?

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Check your answers by turning to the Appendix, Section 4: Activity 2.

## Types of Wills

There are two types of wills.

### Solemn Will

One type is the solemn will. This type of will

- is usually drawn up by a lawyer
- is a legal testament and is signed by the testator in the presence of two witnesses
- must display a statement specifying that the testator was of sound mind and body at the time of signing
- requires that certain minimum amounts be bequeathed to dependants as required by law
- requires **probate**, or validation, upon the death of the testator

*Probate: the legal procedure by which a court declares a certain document to be the last will and testament of a deceased*



A solemn will is drawn up by a lawyer in conjunction with the testator.

**Holograph will:** a will written in the testator's own hand rather than by a lawyer

## Holograph Will

The other type of will is the **holograph will**. This type of will

- is written in the testator's handwriting without the help of a lawyer
- requires no witnesses
- must be signed by a testator
- requires proof that the testator's handwriting and signature are authentic

Not all provinces recognize holograph wills as being legal. Often testators who prepare their own wills fail to understand the complexities of dividing an estate; the result can be a good deal of confusion as to just what their wishes were.

## Contents of a Will

### The Testator

Wills should include statements by the testators that they are of sound mind and body and that they are drawing up their wills of their own free will.

### The Executor/Trustee

A will should name an executor or executrix who will see to it that the terms of the will are carried out. If part of the will is to be held in trust for a period of time (this generally occurs when minors are named as beneficiaries), then a **trustee** should be appointed. The trustee and executor can be the same person.

**Trustee:** someone appointed to hold part of an estate in trust until the beneficiary can take it over



Testators can leave bequests to be held in trust for beneficiaries who are minors.



## Conditions

You cannot include clauses or conditions in a will that are against the law. You can make certain conditions but not others. You cannot make conditions that are cruel, immoral, or so severe that it would be unreasonable for the person involved to meet such requirements. You cannot make conditions that your daughter will inherit from you only if she marries a certain man.

On the other hand, the following types of conditions have been met and ruled valid in a court of law:

- that the wife receive a “gift” if she does not remarry within a reasonable amount of time
- that a child receive a “gift” if that child remains single until reaching the legal age of majority

## Contesting the Will

Sometimes testators know that certain individuals won’t like the contents of their wills. If they anticipate this, they should name the persons and mention why they will not get bequests or will get far less than they might have anticipated.

The testator may include clauses of action to be taken in the event that someone does contest a will.

## Mutual Accident

If two people – a husband and wife for example – die at the same time in some sort of accident, this can cause difficulties in deciding how their estates are to be divided. It must be determined who died first.

## Example

In his will Mr. Lindstrom bequeathed his estate to his wife or, in the event of her dying before him, their daughter. In her will, by contrast, Mrs. Lindstrom directed that her estate go to a son from an earlier marriage.

Now if both Mr. and Mrs. Lindstrom die in a car accident, a problem is created. If Mr. Lindstrom dies first, his wife will inherit his entire estate. When she dies moments later, her estate, which now includes what she inherited from her husband, will go to her son. The daughter will get nothing.

By contrast, if Mrs. Lindstrom dies first, her estate will go to her son as she had directed, but when Mr. Lindstrom dies moments later, all his estate will go to his daughter.

Boy, I can see how the law gets complicated. No wonder people are always advised to see lawyers rather than try to figure out legal complexities by themselves.



Section 1 of the *Survivorship Act* of Alberta states that if two or more persons die at the same time or die in circumstances where it is uncertain which person died first, it is presumed that they died in order of seniority. In other words the eldest died first.

Section 2 states that if testators have made provisions for the disposition of their estates in the event of a mutual accident causing death, such provisions in their wills shall be deemed to have occurred.

In other words if a husband who is older than his wife states that in the event of their mutual deaths it will be considered that she died first, then that is how it will be considered for the disposition of the assets.

Another way of dealing with this is to make a statement of how the estate will be disposed of if the spouse does not survive the deceased for at least thirty days.

### Residue

*Residue: the assets left over after the bequests of a will have been made*

The **residue** is a compiled list of assets left after the bequests of the will have been made. These are usually assets that are left as a result of certain conditions' not being met or assets that were acquired after the will was drawn up. There is usually a clause in a will that instructs what is to be done with the residue.

## Joint Tenancy

If a husband and wife jointly own a home, upon the death of one spouse that home automatically becomes the property of the other. If one spouse jointly owns property with a third person, that person would become the sole owner of the property upon the death of the other, and the surviving spouse would have no claim on that property. Jointly-owned property cannot be left to someone else in a will nor is it considered part of the estate if a person dies intestate because it is not property “owned at death.”



If a husband and wife own a home jointly, on the death of one spouse the home automatically becomes the property of the other.

## Tenants in Common

When property is held by “tenants in common,” each tenant has a share, and upon the death of one tenant that share does not automatically become the property of the other tenants as it does in a joint tenancy. A person can bequeath a tenant share in a will.

## The Marriage Contract

A spouse cannot bequeath any items that belong to that spouse but were already dealt with in a marriage contract with his or her spouse.

## The Dower Act

Under the *Dower Act* a spouse has the right to remain in the matrimonial home after the death of the other spouse. If they were joint tenants, the surviving spouse will automatically become the sole owner of the property.

According to Section 25 of the *Dower Act*, if the property was jointly owned by one spouse and a third party, the surviving spouse has no claim on that property. It will not form part of the property under the *Dower Act*.

4. How is a solemn will different from a holograph will?

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5. Why is a joint-accident clause a good idea in a will?

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6. What is the residue of an estate?

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Check your answers by turning to the Appendix, Section 4: Activity 2.



### Activity 3: Changing and Probating a Will

Everyone should be aware that a will has no effect until the testator dies. In other words if you leave your house to your daughter in your will and then decide to sell it, you may. The will shall not take effect until your death. The part of the will leaving your daughter the house will simply be invalid. The rest of the will remains valid.

#### Codicil

A will can be changed at any time. If it is a small change, the testator can make the change in pen, initial it, and, along with two witnesses, sign the will in the margin beside the change.



**Codicil:** a document containing an addition, deletion, or substitution in a will

The best way to make a change in a will, however, is by using a **codicil**. This is a document that is drawn up by the testator and is attached to the will. It describes the changes to be made in the will. The codicil must be signed by the testator and two witnesses.

If testators make drastic changes in their assets during their lifetimes, they should update or draw up new wills at regular enough intervals to keep the wills' bequests valid.

## Cancelling a Will

To revoke a will is to cancel it. There are three ways to revoke a will. You can

- draw up a new will in which it is stated that all previous wills are revoked
- destroy the will with the intention of revoking it
- get married

Unless people make wills with their marriage in mind and mention this in their wills, their wills become void upon marriage.

In Alberta a divorce or annulment has no effect on a will. If a spouse from whom a person was divorced was named in the will, that spouse can still inherit.



So I guess if you get divorced and want to change your beneficiary, you have to draw up a whole new will.

## Probating a Will

Upon the death of a testator, the executor must apply to the courts for a *Letters Probate*. This is a legal process carried out by the Surrogate Court that will establish that the will is indeed the last will and testament of the deceased and that it is valid.

The executor now has legal title to the deceased person's estate and must distribute the estate according to the wishes of the testator.

## The Roles and Duties of Executors

Executors have seven distinct functions to perform when testators die.

- They obtain formal proof of the testators' deaths and make funeral arrangements.
- They make all claims on behalf of the estates.
- They settle the debts of the estates.
- They pay all taxes and expenses (they must file tax returns for the testators).
- They notify any beneficiaries of the testators' deaths and the beneficiaries' entitlements.
- They dispose of all assets according to instructions and must pay for all legal fees.
- They must account for their actions to the courts.

## The Roles and Duties of Trustees

Trustees have four functions to perform.

- They hold the legal titles to properties for the benefit of others.
- They represent the interests of the beneficiaries.
- They carry out their responsibilities until the periods of trust have elapsed.
- They must account for their actions to the courts.

The courts do set a fee that executors and trustees may charge estates for their services. This fee will vary depending on how much work and time the settling of an estate will take.



It seems to me that executors and trustees can be expected to do a lot of work – especially executors. No wonder they can charge the estates for their services!

1. What is a codicil to a will?

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2. List **three** ways of revoking a will.

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3. Why would a marriage cause a will to be invalid?

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4. What does it mean to probate a will?

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5. Why would it be necessary for executors to be accountable to the courts for their actions?

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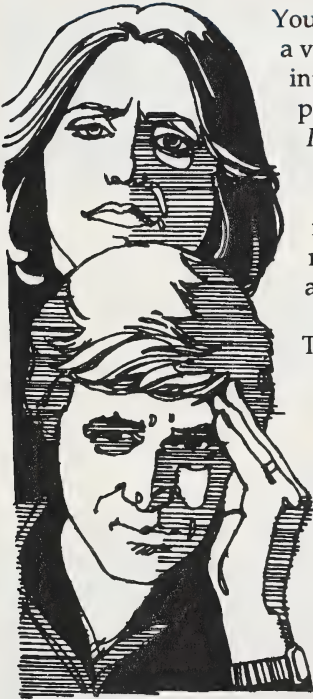
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Check your answers by turning to the Appendix, Section 4: Activity 3.



### Activity 4: Intestate Deaths



An intestate death can cause headaches for family members.

You will remember that when a person dies without a valid will, that person is said to have died intestate. When this occurs in Alberta, that person's estate is distributed according to the *Intestate Succession Act* of Alberta.

Upon the death of a person who has died intestate, someone may apply to the courts to be named as administrator or the courts will appoint an administrator for the estate.

The duties of the administrator are the same as they are for an executor except that an administrator has to dispose of the estate according to the *Intestate Succession Act* instead of a will. An administrator must also account for his or her actions to the court.



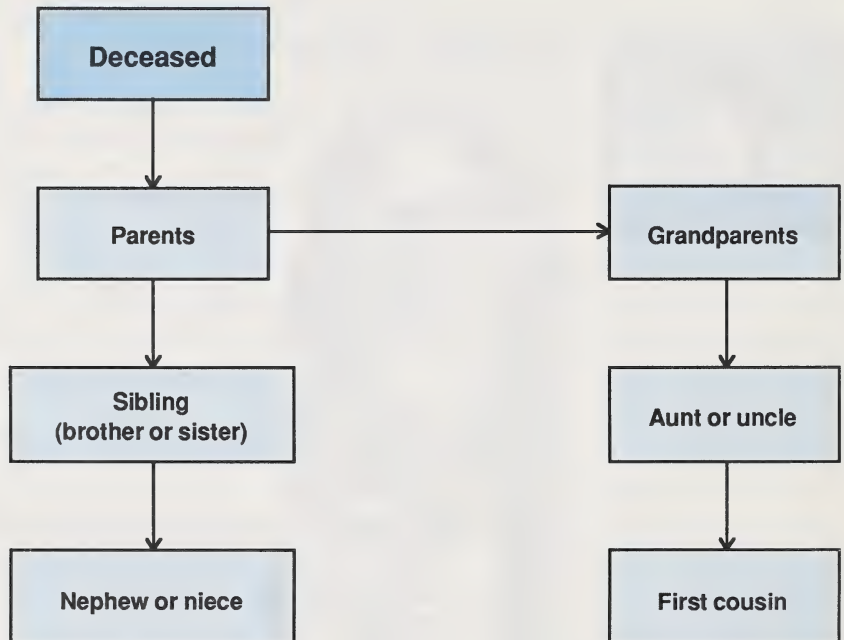
## Distribution of the Estate of an Intestate

In Alberta the *Intestate Succession Act* specifies that the estate is to be divided according to the following rules, depending on the survivors. Note that the division of the estate is made only after all expenses are paid.

**Lineal descendants:**  
the spouse and children  
of a deceased

**Collateral relatives:**  
relatives of a deceased  
other than lineal  
descendants

The first line of inheritance is the lineal line. **Lineal descendants** are the surviving spouse of the deceased and any children (children of the deceased are called *issue*). If there is no spouse and no children, then the estate is distributed among the deceased's **collateral relatives**. The chart that follows illustrates the order in which collateral relatives will receive an intestate's estate.



According to Section 9 of the *Intestate Succession Act* relatives who are of half-blood shall inherit just as do those of whole-blood. For example, if you go back to the aunts and find that some aunts were half-sisters, they will all inherit to the same degree.

According to Section 10 of the *Intestate Succession Act*, descendants and relatives of the deceased who were conceived before the deceased's death but born after shall inherit as if they had been born in the lifetime of the intestate and survived him or her.

If the intestate was married and only a spouse survives, the spouse will receive all of the estate.

If the intestate was married and a spouse and child survive, this rule applies:

If the net value of the estate is less than \$40 000, the spouse inherits the whole estate. If the net value of the estate is more than \$40 000, the spouse gets the first \$40 000 and the rest is divided equally between the spouse and child.

### Example

#### Estate Worth \$100 000

First \$40 000 to spouse	One-half of remainder to spouse – \$30 000	<b>Total Distribution</b> Spouse – \$70 000 Child – \$30 000
	One-half of remainder to child – \$30 000	

If the intestate was married and a spouse and more than one child survive, this rule applies:

The spouse receives the first \$40 000 plus one-third of the remaining estate. The other two-thirds is divided equally among the children.

### Example

#### Estate Valued at \$100 000

Spouse receives first \$40 000	Spouse receives one-third – \$20 000	<b>Total Distribution</b> Spouse – \$60 000 Child #1 – \$20 000 Child #2 – \$20 000
	Child #1 One-third – \$20 000	
	Child #2 One-third – \$20 000	

When there are more than two children the children will split the remaining two-thirds.

### Example

#### Estate Valued at \$100 000

Spouse receives first \$40 000	Spouse receives one-third – \$20 000		<b>Total Distribution</b> Spouse – \$60 000 Child #1 – \$10 000 Child #2 – \$10 000 Child #3 – \$10 000 Child #4 – \$10 000
	\$10 000	\$10 000	
	\$10 000	\$10 000	

If a child of the deceased has died, the spouse of that child and their children will inherit. An example would be that if Child #3 in the preceding chart had died and left a spouse and two children, that spouse and the children would receive the \$10 000.

If an intestate leaves no spouse and children, then the estate is divided equally according to the following order:

- parents: Each parent gets an equal share, but if there is only one parent, that one gets the entire estate.
- brothers and sisters (If they are dead, their children will inherit.)
- all nieces and nephews in equal shares
- next of kin of equal degree of consanguinity (related equally closely)



If an intestate dies leaving no spouse or children, the estate is divided among the relatives according to strict formulas.

1. What does it mean to die *intestate*?

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2. What statute in Alberta governs what happens to the estate of a person who has died intestate?

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3. Put numbers in the blanks beside each of the following people to indicate the order in which they would inherit from the estate of an intestate.

\_\_\_\_\_ a. nephew

\_\_\_\_\_ b. child

\_\_\_\_\_ c. aunt

\_\_\_\_\_ d. mother

\_\_\_\_\_ e. spouse



4. Ms. Kinderchuk died intestate, leaving an estate worth \$70 000. She was survived by a husband and three children – Lorraine, Jasmine, and Marcel. How much would each person stand to inherit (to the nearest dollar)?

- a. Mr. Kinderchuk \_\_\_\_\_
- b. Lorraine \_\_\_\_\_
- c. Jasmine \_\_\_\_\_
- d. Marcel \_\_\_\_\_

Check your answers by turning to the Appendix, Section 4: Activity 4.

### Advances

Sometimes advances can be made on an inheritance. A parent, for example, might want to help out a child financially.

The *Intestate Succession Act* states that if a child has received an advance on an inheritance, that advance will be considered when the final distribution is being made. The fact that a child did receive an advance must either have been noted by the deceased or the child in question or else it has to be proven by the person who is asserting the claim – perhaps another child who wants to be assured of getting a fair share of the estate.



Advances can be made on an inheritance if a testator so desires.

## Illegitimate Children

In Alberta an illegitimate child is considered the legitimate child of his or her mother for purposes of inheritance. In regard to the death of the intestate father of an illegitimate child, application must be made to the courts if the child is to inherit. **One** of the following must be proven:

- The intestate father acknowledged the paternity of the illegitimate child.
- The deceased has been declared to be the father by an order made under any of the provisions of another act.

## Adultery

Section 15 of the *Intestate Succession Act* states that a surviving spouse who had left the intestate and was living in adultery at the time of the intestate's death shall take no part in the estate.

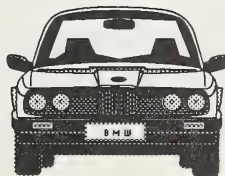
## Activity 5: The Inheritance

### Taxes

In Alberta there are no succession duties or estate taxes to be paid to the government. The federal government, however, may charge capital gains taxes on certain properties in an estate. These taxes would be paid with the income-tax return that is filed every April.

### Debts on an Inheritance

If you are the beneficiary of property or chattels (property other than real estate) that have claims against them, you automatically assume the debts when you assume ownership of the property. In other words, if you receive a car under the terms of a will and there is still some money owing on the car, you will be responsible for the payments. You may, of course, refuse the car. The executor would then sell the car, pay what is owing on it from the proceeds, and then put what is left into the residue of the estate.



## Provision For Dependants

When testators do not make provisions for the care of all those people who have reasons to be dependent on them – such as spouses, children, or siblings if they were supporting them at the time of their deaths – the dependants may appeal to the court to have the wills changed.

If the court is provided with proof for the claim, it will usually make a fair award.

Any children who were adopted or are illegitimate and can prove paternity will have the same rights as natural children born in wedlock.

The *Family Relief Act* – an Alberta statute – gives a judge the power to decide if dependants have been adequately provided for. In order to establish a claim under this act, you must be able to prove that you were financially dependent on the deceased at the time of his or her death. You must be in one of the following categories to qualify:

- a spouse who was financially dependent
- a person acting for a minor dependant
- a person over the age of eighteen but still dependent because of full-time attendance at school
- a person who is dependent due to a mental and/or physical disability

A common-law partner cannot normally make a claim under the *Family Relief Act* because, as a rule, common-law partners have no claim on the partner's estate if that partner dies intestate.

If, however, there has been a long-term relationship and one partner dies intestate, a common-law partner may make application to receive some benefit from the estate. There have been cases where the relationship was of such a long duration that the court judges ruled that the common-law partner did have a right to a portion of an intestate partner's estate.



Only those people who can prove they were financially dependent on a deceased can claim under the *Family Relief Act*.

If a common-law partner's children were not left anything in a will, that partner can contest the will on behalf of the children. A court will decide if the claim is valid depending on the proof of paternity.

1. Why might the beneficiary of a will choose not to accept an inheritance for financial reasons? Use an example to illustrate your answer.
- 
2. Who can make claims on the estate of a deceased under the *Family Relief Act*?
- 

Check your answers by turning to the Appendix, Section 4: Activity 5.



## Follow-up Activities

If you had difficulties understanding the concepts in the activities, it is recommended that you do the Extra Help. If you have a clear understanding of the concepts, it is recommended that you do the Enrichment.

### Extra Help

#### A Brief Summary

Everyone over the age of majority should have a will. Wills are of two types:

- solemn wills, drawn up by lawyers
- holograph wills, written by testators themselves

A will should name an executor or executrix to see that its terms are carried out. If property is to be held in trust for a minor, a trustee should be named as well.

Testators can change their wills at any time. A small change can be written in, initialled, and witnessed, but a codicil should be drawn up for an important change.

When a testator dies, a legal process is commenced to probate the will, that is, to establish its authenticity. After this, the executor must distribute the estate according to the will's provisions.

When people die intestate in Alberta, the *Intestate Succession Act* determines how to distribute the estate. The estate will go first to lineal descendants, then to collateral relatives, according to special formulas. If dependants of a deceased think that they have not been adequately provided for, they can make application under the *Family Relief Act* – another statute of Alberta.

Indicate whether each of the following statements is true or false by putting a T or F in the space provided to the left of each statement.

- \_\_\_\_\_ 1. The provisions of a will take effect as soon as it is signed and witnessed.
- \_\_\_\_\_ 2. The ordinary form of a will is called a holograph will.
- \_\_\_\_\_ 3. Witnesses are required to sign a holograph will.
- \_\_\_\_\_ 4. A will can contain the condition that a child will inherit only if that child marries a certain individual.

- \_\_\_\_\_ 5. A witness to a will cannot also be a beneficiary.
- \_\_\_\_\_ 6. Any specific bequests that cannot be carried out will become a part of the residue.
- \_\_\_\_\_ 7. No witnesses are required to make a codicil valid.
- \_\_\_\_\_ 8. The marriage of the testator automatically revokes that person's will.
- \_\_\_\_\_ 9. Probate is the procedure by which the will of the deceased person is approved by the Court of Queen's Bench.
- \_\_\_\_\_ 10. Executors receive no compensation for their services.
- \_\_\_\_\_ 11. A testator must always be of legal age.
- \_\_\_\_\_ 12. Holograph wills are recognized in all provinces.
- \_\_\_\_\_ 13. The trustee and executor of a will can be the same person.
- \_\_\_\_\_ 14. The *Survivorship Act* of Alberta assumes that if a husband and wife die together, the husband died first.
- \_\_\_\_\_ 15. A spouse cannot bequeath any items already dealt with in a marriage contract.
- \_\_\_\_\_ 16. A will can be revoked by destroying it with the intention of revoking it.
- \_\_\_\_\_ 17. It is an executor's duty to notify beneficiaries of their entitlements.
- \_\_\_\_\_ 18. A court-appointed administrator's decisions are governed by the *Intestate Succession Act*.
- \_\_\_\_\_ 19. Aunts and uncles are lineal relatives.
- \_\_\_\_\_ 20. If a male intestate leaves an estate worth \$30 000, his wife will inherit all of it.

Check your answers by turning to the Appendix, Section 4: Extra Help.

## Enrichment

1. Read the cases that follow and answer the questions based on them.
  - a. Mr. Thompson made a valid will in which he left three valuable antique chairs to his daughter Edith. He later drew a line through Edith's name and substituted the name of his son Robert. When Thompson's will was read, both children claimed the furniture.

To whom will the courts award the chairs? Explain your answer.

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- b. Bill and his wife, who was younger than Bill, were both in an accident in which Bill was killed immediately. They had no children. Bill had a will in which he had written:

"I leave everything to my wife, Jeanne, provided she survives me by thirty days; then I leave everything to my brother, John."

Jeanne also had a will in which she left everything to her mother.

Jeanne died two days after the accident. Who will end up with Bill's property – John or Jeanne's mother? Explain your answer.

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- c. Petruk legally executes a will in which one of the bequests is a house and lot to his nephew, Emil Petruk. Petruk informs Emil in a letter that he, Emil, is to benefit by the will, but does not tell Emil exactly what he is to inherit. Later Petruk changes his mind and adds a valid codicil to his will by which he leaves the house and lot to his brother Orest, and nothing to Emil. When the will is read and Emil finds that he has been disinherited, he takes legal action to have the codicil set aside and produces the letter from Petruk as evidence of intention.

What would the court decide? Explain your answer.

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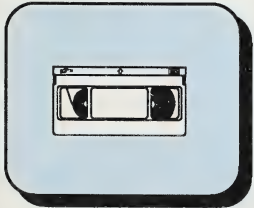
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2. The videotape *Wills*, another tape in the ACCESS series *You and the Law*, should be interesting viewing at this point. This video contains many practical tips on making a will but does not include too much real legal theory. Nevertheless you might find it informative; and what it teaches you could certainly come in handy someday.

Check your answers by turning to the Appendix, Section 4: Enrichment.



## Conclusion

It's important for everyone over the age of majority to have a will; it simplifies what can be a complex process. Though the legal machinery exists to deal with the estates of those who die intestate, it is much more likely that the wishes of the deceased will be carried out if they are expressed in a properly drawn-up will.

Assignment  
Booklet

### ASSIGNMENT

Turn to your Assignment Booklet and do the assignment(s) for Section 4.




## MODULE SUMMARY

No field of law is in such a state of flux as is family law. Seldom does a month go by without a significant new decision being reported. That's one reason why family law is so interesting and challenging. A second and equally important reason is the fact that many cases in family law are so critical in the lives of the participants. The course of a lifetime can be determined by the ruling in a divorce case; this is even more obvious in child-custody cases.

For these reasons family law is an exceptionally fascinating and important area of law.

# APPENDIX

	Glossary
	Activities
	Extra Help
	Enrichment



## Glossary

Abduction	<ul style="list-style-type: none"><li>• the carrying off of a person by force</li></ul>
Access	<ul style="list-style-type: none"><li>• the right of non-custodial parents to visit their children</li></ul>
Accessory after the fact	<ul style="list-style-type: none"><li>• a person who protects someone known by that person to have committed a crime</li></ul>
Adoption disclosure	<ul style="list-style-type: none"><li>• the release of information about an adoption</li></ul>
Adultery	<ul style="list-style-type: none"><li>• voluntary sexual relations between a married person and someone other than that person's spouse</li></ul>
Affinity	<ul style="list-style-type: none"><li>• relationship by marriage</li></ul>
Alimony	<ul style="list-style-type: none"><li>• payments made by one spouse to the other while the couple are separated but still married</li></ul>
Annulment	<ul style="list-style-type: none"><li>• the making of something – such as a marriage – legally invalid or void</li></ul>
Beneficiary	<ul style="list-style-type: none"><li>• a person named to receive a benefit, for example, a bequest under the terms of a will</li></ul>
Child custody	<ul style="list-style-type: none"><li>• legal responsibility for a child's welfare</li></ul>
Codicil	<ul style="list-style-type: none"><li>• a document containing an addition, deletion, or substitution in a will</li></ul>
Cohabitation	<ul style="list-style-type: none"><li>• the situation in which a couple live together as husband and wife</li></ul>
Collateral relatives	<ul style="list-style-type: none"><li>• relatives of a deceased other than lineal descendants</li></ul>
Common-law marriage	<ul style="list-style-type: none"><li>• the relationship of a man and woman who live together as husband and wife but who have not gone through a legal marriage ceremony</li></ul>
Consanguinity	<ul style="list-style-type: none"><li>• relationship by blood; relationship by a common ancestor</li></ul>
<i>Decree absolute</i>	<ul style="list-style-type: none"><li>• the court order making a divorce final</li></ul>
<i>Decree nisi</i>	<ul style="list-style-type: none"><li>• an interim court order concerning a divorce</li></ul>



<b>Desertion</b>	<ul style="list-style-type: none"><li>• the physical absence of one partner in a marriage with the intention not to return</li></ul>
<b>Divorce</b>	<ul style="list-style-type: none"><li>• the legal dissolution of a marriage</li></ul>
<b>Estate</b>	<ul style="list-style-type: none"><li>• the entire collection of assets and liabilities that a person owns at death</li></ul>
<b>Executor</b>	<ul style="list-style-type: none"><li>• a male person appointed by a testator or testatrix to carry out the terms of his or her will</li></ul>
<b>Executrix</b>	<ul style="list-style-type: none"><li>• a female person appointed by a testator or testatrix to carry out the terms of his or her will</li></ul>
<b>Holograph will</b>	<ul style="list-style-type: none"><li>• a will written in the testator's own hand rather than by a lawyer</li></ul>
<b>Illegitimate</b>	<ul style="list-style-type: none"><li>• born of parents who are not married to each other</li></ul>
<b>Joint custody</b>	<ul style="list-style-type: none"><li>• a form of custody in which both parents remain legally responsible for the children though the children may live with only one of the parents</li></ul>
<b>Legitimate</b>	<ul style="list-style-type: none"><li>• born of parents married to each other</li></ul>
<b>Lineal descendants</b>	<ul style="list-style-type: none"><li>• the spouse and children of a deceased</li></ul>
<b>Maintenance payments</b>	<ul style="list-style-type: none"><li>• payments made by an ex-spouse to his or her former spouse after a divorce or annulment</li></ul>
<b>Matrimonial property</b>	<ul style="list-style-type: none"><li>• property owned in common by a married couple</li></ul>
<b>Petitioner</b>	<ul style="list-style-type: none"><li>• one who applies to the court, e.g., the spouse who applies for a divorce or judicial separation</li></ul>
<b>Petition for divorce</b>	<ul style="list-style-type: none"><li>• the original request to the court for a divorce</li></ul>
<b>Probate</b>	<ul style="list-style-type: none"><li>• the legal procedure by which a court declares a certain document to be the last will and testament of a deceased</li></ul>
<b>Residue</b>	<ul style="list-style-type: none"><li>• the assets left over after the bequests of a will have been made</li></ul>
<b>Respondent</b>	<ul style="list-style-type: none"><li>• a person from whom a petitioner is seeking a divorce or judicial separation</li></ul>

**Separation**

- the termination of cohabitation by mutual agreement or judicial decree

**Testator**

- a male person who draws up his will

**Testatrix**

- a female person who draws up her will

**Trustee**

- someone appointed to hold part of an estate in trust until the beneficiary can take over

**Ward**

- a person under the care of a protection agency such as the Department of Social Services

**Will**

- a legal document drawn up by a person specifying how that person's property is to be distributed after death

## Suggested Answers

### Section 1: Activity 1

1. Answers will vary. One reason is to ensure that those marrying meet the requirements of age, consanguinity, and affinity. Another reason is to ensure that records of legally-married people are on file so that the rights and obligations involved in marriage can be enforced if necessary.
2.
  - a. P
  - b. P
  - c. F
  - d. P

### Section 1: Activity 2

1.
  - a. Since Jodes is not the one to break the engagement, she need not return the ring. The gifts were given as inducements to, or in contemplation of, the marriage, but again, since it is not Jodes who is in breach of contract, she can keep these gifts.
  - b. Yes. These clothes were completely unrelated to the engagement and were clearly not given as gifts. Grabsky should receive compensation.
2. Examples will vary. Here are a few ideas:
  - “I’m a very wealthy woman; I own a house in London, a condo in Paris, and a villa in Spain” (spoken by a woman with very few financial assets).
  - “I’m in great health; I expect to live to be a hundred like my grandfather” (spoken by a man diagnosed as having a terminal and contagious disease).
  - “I’m a scrupulously honest person; I put truthfulness above everything else” (spoken by a woman with three convictions of fraud and one of perjury).

### Section 1: Activity 3

1. These may be situations in which the courts rule that marriage is desirable for a person under the age of sixteen but the parents refuse to give their consent.
2. Essentially, if important matters such as good faith and successful cohabitation are in order, the courts do not wish to invalidate a marriage over a minor technicality.

3.
  - A solemn declaration must be made by both parties to the effect that they know of no legal reason why they should not be married.
  - Each person must call upon the people present to witness that he or she takes the other person to be his or her lawful wedded spouse.
  - The officiator must pronounce the couple husband and wife.
  - After the ceremony the officiator, the couple, and witnesses must sign the marriage register and a statement of marriage.
4. Answers will vary. One possibility is the security of knowing that things are arranged as you'd like them to be should things go wrong.
5. Answers will vary. One possibility is that the divorce rate is increasing, so couples are realistically planning for that eventuality.
6. No. Personal services as laid out in a marriage contract are not enforceable in the courts.
7. Answers will vary. Such contracts are very useful if a marriage breaks down, but some people feel that they help destroy the commitment that is fundamental to a marriage. Planning for the destruction of what ought to be a lifelong relationship can, some argue, help destroy that very relationship.

### Section 1: Activity 4

1. No. There is no indication that Baron Van Massey fraudulently misrepresented himself, and even if he had, fraud as to social and financial position is not ordinarily grounds for annulment.
2. This situation is not entirely clear-cut. The courts would have to decide whether the pressure Shauna's family put on her was enough to constitute duress. In particular, the courts would have to determine whether or not Shauna felt her life genuinely threatened by her mother's words, or whether Shauna knew that her mother did not literally mean what she said.
3. No. Neither spouse knew of Anne-Marie's infertility at the time of their marriage, so there are no grounds for annulment.



### Section 1: Activity 5

1. T
2. F
3. T
4. F
5. F
6. T

### Section 1: Activity 6

1. Yes. If June actively contributed to the business for a length of time, she can claim compensation for her contributions.
2. No. This right is not accorded people who are not legally married. People living common law are considered to be single people under criminal law.

### Section 1: Follow-up Activities

#### Extra Help

1. a. T                      h. F
- b. F                    i. F
- c. F                    j. T
- d. T                    k. F
- e. T                    l. F
- f. F                    m. F
- g. T

2. Fill in the blank spaces in the following statements.
  - a. An engagement is an agreement to marry and is governed by the ordinary rules of **contract law**.
  - b. Any promise of a **gift** that is made in connection with a marriage must be in writing to be enforceable.
  - c. The party who unjustifiably breaks the engagement **cannot** be legally compelled to marry the other party.
  - d. The parties to a marriage must not be related within the prohibited degrees of **affinity or consanguinity**.
  - e. No person under the age of **sixteen** may be married in Alberta except for a pregnant female or the mother of a living child.
  - f. There must be **two** witnesses present at the marriage ceremony.
  - g. A husband and wife are legally free to enter into **contracts** with one another.
  - h. Communications between a husband and wife during coverture are **privileged**.
    - i. The most frequent exception to the general rule that one spouse is not responsible for the other's contract is the case where a wife enters into contractual obligations in the capacity of her husband's **agent**.
    - j. A wife is her husband's assumed agent when entering into reasonable contracts for **necessities**.
  - k. **Annulled** marriages are those which, from a legal point of view, never existed.
    - l. One of the most frequently used grounds for annulment is that of **fraud**, which is based on a misrepresentation or concealment of some vital fact by one of the parties.
  - m. Under the *Worker's Compensation Act* a common-law spouse in Alberta may receive compensation upon the death of his or her partner.

### Enrichment

1. Did you find the material that you required? Did you find the topic interesting? Were you able to present your ideas in a clearly-written paper? What do you think of our laws governing common-law relationships? Should they be changed? If so, how?

## Section 2: Activity 1

1. Wording will vary. Cohabitation exists when a couple live together as husband and wife.
2. The two elements are as follows:
  - A physical separation of the partners must have occurred.
  - One of the two partners must have the intention not to return.

## Section 2: Activity 2

1. The three types of separation are
  - living apart
  - legal separation
  - judicial separation
2. Five provisions that may be included in a separation agreement are
  - an agreement for the parties to live apart and not annoy each other
  - a division of assets
  - financial provisions
  - provisions for custody of the children and access to them
  - a cost-of-living clause
3. A separation agreement is a contract enforceable by the courts. Gisela is in breach of contract. Quentin may obtain an injunction to prevent her from working. However, if Gisela can establish that Quentin is not providing enough money for their children, the court may rule differently.

## Section 2: Activity 3

1. An annulment means that in the eyes of the law the marriage never occurred. A divorce legally dissolves an existing marriage.
2.
  - a. A petitioner is someone who applies to the court, for example, a spouse who applies for divorce.
  - b. A respondent is the person from whom the petitioner is seeking something, for example, a divorce.
  - c. A co-respondent is a third party to a suit involving a respondent and a petitioner, for example, a person with whom a respondent in a divorce case committed adultery.

3. The two requirements for a divorce are as follows:
  - A breakdown has occurred in the marriage.
  - Provincial residence requirements are met (in Alberta one spouse has to have been living in the province for at least a year).
4. The three grounds for divorce are that
  - the spouses have been apart for at least a year

OR

  - the spouse against whom the divorce proceeding is brought has committed adultery

OR

  - the spouse against whom the divorce proceeding is brought has treated the other spouse with cruelty
5. The four bars to divorce are
  - collusion
  - condonation
  - connivance
  - inadequate provision for care of the children
6. Answers will vary. Mediation saves the expense of hiring lawyers to work out the details of the divorce. There is also the possibility that mediation can lead to a reconciliation; at the very least it will probably minimize hard feelings.
7. The courts want to prevent a situation in which someone marries a wealthy person and instantly files for divorce, hoping to make off with a good share of the wealthy person's property.
8. *Alimony* consists of payments made while a couple is separated but still married. *Maintenance payments* consist of payments made after an annulment or divorce.
9. The *Maintenance Enforcement Act* is designed to ensure that ex-spouses who are required to make maintenance payments do, in fact, make those payments.



## Section 2: Follow-up Activities

### Extra Help

1. In a situation where the husband and wife are living apart they would be well advised to have a **lawyer** draft a separation agreement.
2. Maintenance for children is usually fixed until the children reach a certain **age**.
3. An official separation order does not allow either party to **marry** again during the other's lifetime.
4. A separation can be enforced just like any other **contract**.
5. In addition to being physically absent the second vital element of **desertion** is the intention not to return.
6. The party who starts the divorce proceeding is called the **petitioner**, and the other party is called the **respondent**.
7. Divorce actions are conducted in the Court of Queen's Bench according to the *Divorce Act*, which is a **federal** act applicable to all of Canada.
8. **Adultery** involves voluntary sexual relations by a married person with someone of the opposite sex other than his or her spouse.
9. **Collusion** is an agreement, or conspiracy, involving the divorce petitioner that is intended to deceive the court.
10. **Connivance** occurs when one marriage partner encourages, aids, or permits the other to perform an act that can be used as a ground for divorce.
11. A decree of divorce is usually granted in **two** stages.
12. Three types of separation are **living apart**, **legal separation**, and judicial separation.
13. The court order finalizing a divorce is called a *decree absolute*.
14. Divorce **mediation** is a process whereby a minister, psychologist, or some other third party meets with a couple to work on an agreement.
15. The rules governing the property division in a divorce are set forth in the *Matrimonial Property Act*.
16. If an ex-spouse is not making the required maintenance payments, the other ex-spouse can turn to the *Maintenance Enforcement Act* for help.

### Enrichment

1. Did you find the material you needed? Would you like to see other changes in Canada's divorce laws? Have you explained your ideas clearly?

### Section 3: Activity 1

1.
  - a. It would likely be Smithers.
  - b. The alternatives are
    - Frederick
    - Frederick-Smithers (Smithers-Frederick is possible, but the legal preference is for alphabetical order)
    - an unhyphenated combination of the two names
2. The possible surnames are
  - Calhoun
  - Finklestein
  - Calhoun-Finklestein (alphabetical order is preferred)
  - an unhyphenated combination of the parents' names
3.
  - a. No, she will be considered to have been legitimate from birth.
  - b. It will change when her parents marry.
  - c. No. Her original birth certificate will be replaced.
4. No. Parents are required only to provide "acceptable" schooling until the child reaches the age of sixteen.
5.
  - a. Answers will vary. Judges generally assume that it is in the best interests of children to do all that can be done to save their lives in such situations.
  - b. Answers will vary. Are your ideas clearly explained?

### Section 3: Activity 2

1. Answers will vary. One disadvantage is that the children involved can develop a sense of rootlessness and insecurity when they are constantly shuffled back and forth between their parents.
2. Answers will vary. Different cultures have differing value systems. One culture, for example, might feel that child rearing should be entirely a mother's affair, and might hesitate to return an abducted child to a father who had been awarded custody in another country.

### Section 3: Activity 3

1. Adoptive parents are legally the adopted child's parents. As they raise a child, a strong emotional bond is naturally formed as with natural parents. Severe emotional difficulties could arise if adopted children had access to the records revealing their biological parents. It is felt to be in the interests of the adoptive family unit that adoption records be sealed.
2. Answers will vary. Some people feel it's simply a matter of rights; adopted children, they believe, should have the right to see their own files. Other people feel that it's preferable for all concerned if children don't see their files. Opening files can cause a rift between adoptive parents and the children they have raised. This point of view tends to stress the rights of the adoptive parents.

### Section 3: Activity 4

1. A "young person" is one between the ages of twelve and eighteen.
2. Answers will vary. This is an issue that is receiving a good deal of public debate these days. Some people believe children should be treated much more leniently than adults; the hope is that the children will not turn into hardened criminals. Others think that teenage criminals need to be punished severely if they are to be deterred from further criminal activities.
3. Answers will vary. Have you expressed your views clearly? Were you able to come up with any alternative solutions?

## Section 3: Follow-up Activities

### Extra Help

1. In Alberta every birth must be registered within **ten** days of its occurrence.
2. If a child is born to an unmarried woman, the child will carry the **mother's** name.
3. A **legitimate** child is one born of married parents.
4. Every child must attend school between the ages of **six** and **sixteen**.
5. After a divorce **both** parents are still expected to contribute money towards their children's upbringing.
6. If parents or guardians **abuse** or abandon children in their care, the state may take over the responsibility of raising the children.
7. Children taken from their parents and placed in the care of a protection agency are called **wards** of that agency.
8. Both parents are responsible for supporting their children until they reach the age of **eighteen**.
9. To be eligible to adopt a child in Alberta, adoptive parents must be not more than **forty** years older than the child they wish to adopt.
10. No action can be taken to set aside an adoption after **one** year.
11. The release of information about an adoption is called **disclosure**.
12. The *Young Offenders Act* deals with people between the ages of **twelve** and **eighteen**.
13. Young offenders aged **fourteen** or older may be transferred to an adult court if a **serious** crime is involved.
14. Under Section 29 of the *Young Offenders Act* no statement given by a young person is admissible in court unless the young person had the chance to consult with **counsel** or parents and make the statement in their presence.
15. The records of a young offender are available only to the **attorney general** or a person authorized by that official.



### Enrichment

1. The trial judge's decision was unusual in that it went against the wishes of the child in deciding who would have custody. The judge's thinking was no doubt that it was in the child's best interests to be with his father even if the child did not realize this.
2. The reason was probably the son's continuously expressed wish to live with his mother.
3. Answers will vary. Have you explained your reasons clearly?

### Section 4: Activity 1

1. A will is a legal document drawn up by a person specifying how that person's property is to be distributed after death.
2. A testator is a male person who draws up a will.
3. A beneficiary is a person named to receive a benefit, for example, a bequest under the terms of a will.

### Section 4: Activity 2

1. The provisions take effect upon the death of the testator.
2. Anyone who is not a beneficiary to a will or the spouse of a beneficiary may be a witness to a will.
3. A lawyer is best qualified to draw up a will.
4. A solemn will is drawn up by a lawyer and must be witnessed. A holograph will is written by the testator and need not be witnessed.
5. It is a good idea because it determines, according to the wishes of the spouses, who will be considered to have died first in case of a mutual accident. This can have a profound effect on how an estate will be distributed if such an eventuality occurs.
6. The residue of an estate is what is left over after the bequests of a will have been made.

### Section 4: Activity 3

1. A codicil is a document containing an addition, deletion, or substitution in a will.
2. The three ways are as follows: You can
  - draw up a new will in which it is stated that all previous wills are revoked
  - destroy the will with the intention of revoking it
  - get married
3. When a person marries, their financial responsibilities change. Previously-made wills will therefore be cancelled automatically.
4. To probate a will means to declare the document to be, in fact, the last will and testament of a deceased. The Surrogate Court probates wills.
5. This is to ensure that the executors do not deplete the assets of the estates through negligence or criminal intent.

### Section 4: Activity 4

1. To die intestate is to die without having drawn up a will.
2. The statute is the *Intestate Succession Act*.
3. a. 4
  - b. 2
  - c. 5
  - d. 3
  - e. 1
4. a. \$50 000
  - b. \$6667
  - c. \$6667
  - d. \$6667

### Section 4: Activity 5

1. Answers will vary. An example might be that a beneficiary was bequeathed a heavily mortgaged house. More simply, beneficiaries might be bequeathed things they simply do not like – vicious pets, worthless belongings, and so on. There are any number of reasons for refusing a bequest.
2. The following people can make claims under the *Family Relief Act*.
  - a spouse who was financially dependent
  - a person acting for a minor dependant
  - a person over the age of eighteen but still dependent because of full-time attendance at school
  - a person who is dependent due to a mental and/or physical disability

### Section 4: Follow-up Activities

#### Extra Help

- |       |       |
|-------|-------|
| 1. F  | 11. F |
| 2. F  | 12. F |
| 3. F  | 13. T |
| 4. T  | 14. F |
| 5. T  | 15. T |
| 6. T  | 16. T |
| 7. F  | 17. T |
| 8. T  | 18. T |
| 9. F  | 19. F |
| 10. F | 20. T |

### Enrichment

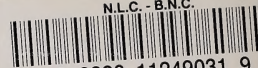
1. a. The chairs will be awarded to Edith. The change should have been initialled and witnessed.
- b. John will get the property. Since Jeanne did not survive Bill by thirty days, she will not inherit his property. It will go straight to John.
- c. The court would decide in favour of Orest. Petruk had made a valid codicil, thereby cancelling his previous intentions.







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